

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES J. LAUGHLIN  
ALLAN U. FORTE,

Appellants

v.

UNITED STATES OF AMERICA,  
Appellee

19562

19563

532

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JOINT APPENDIX

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1965

JAMES J. LAUGHLIN,  
Appellant in proper person

WILLIAM J. GARBER,  
Counsel for Appellant Forte

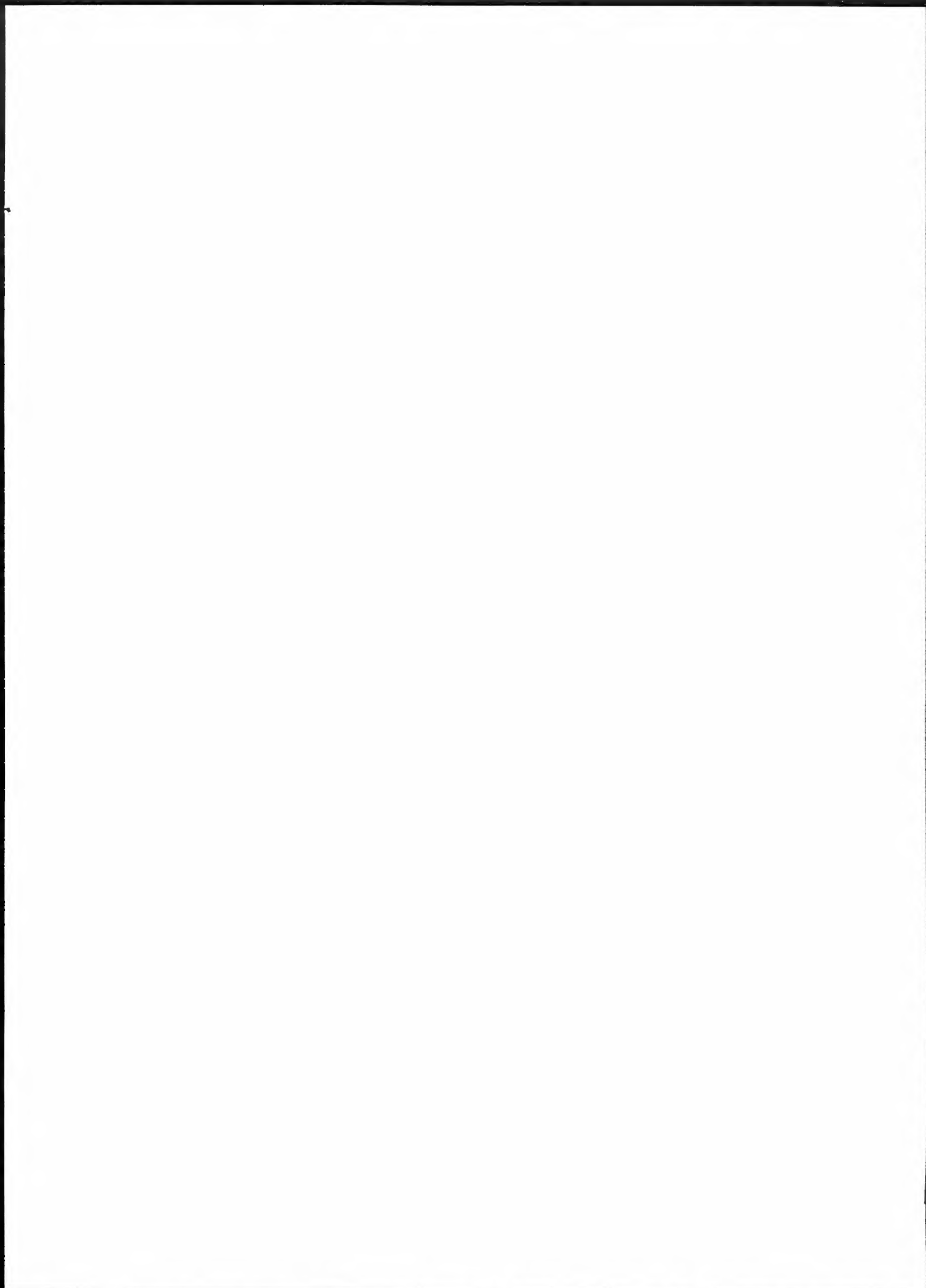
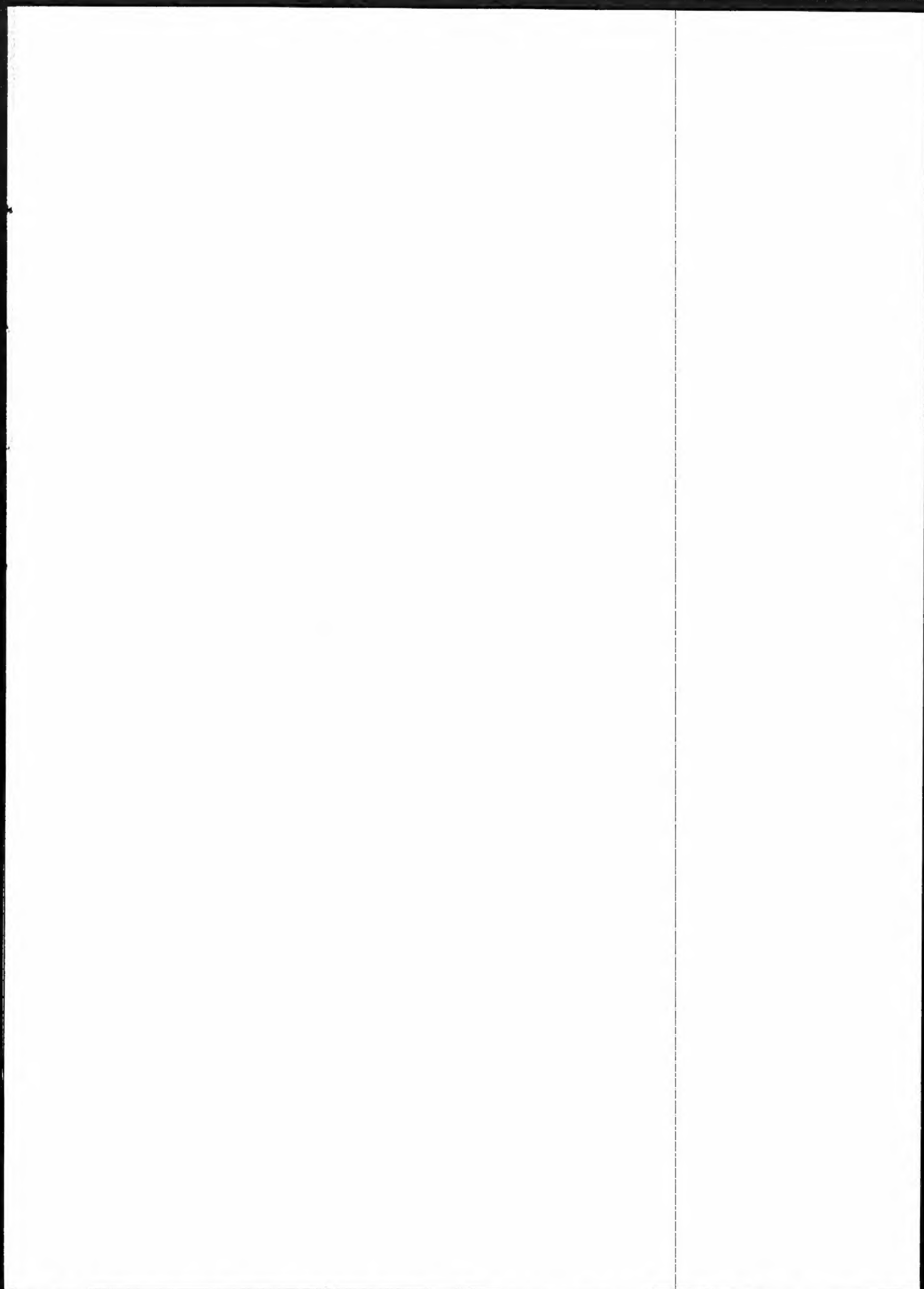


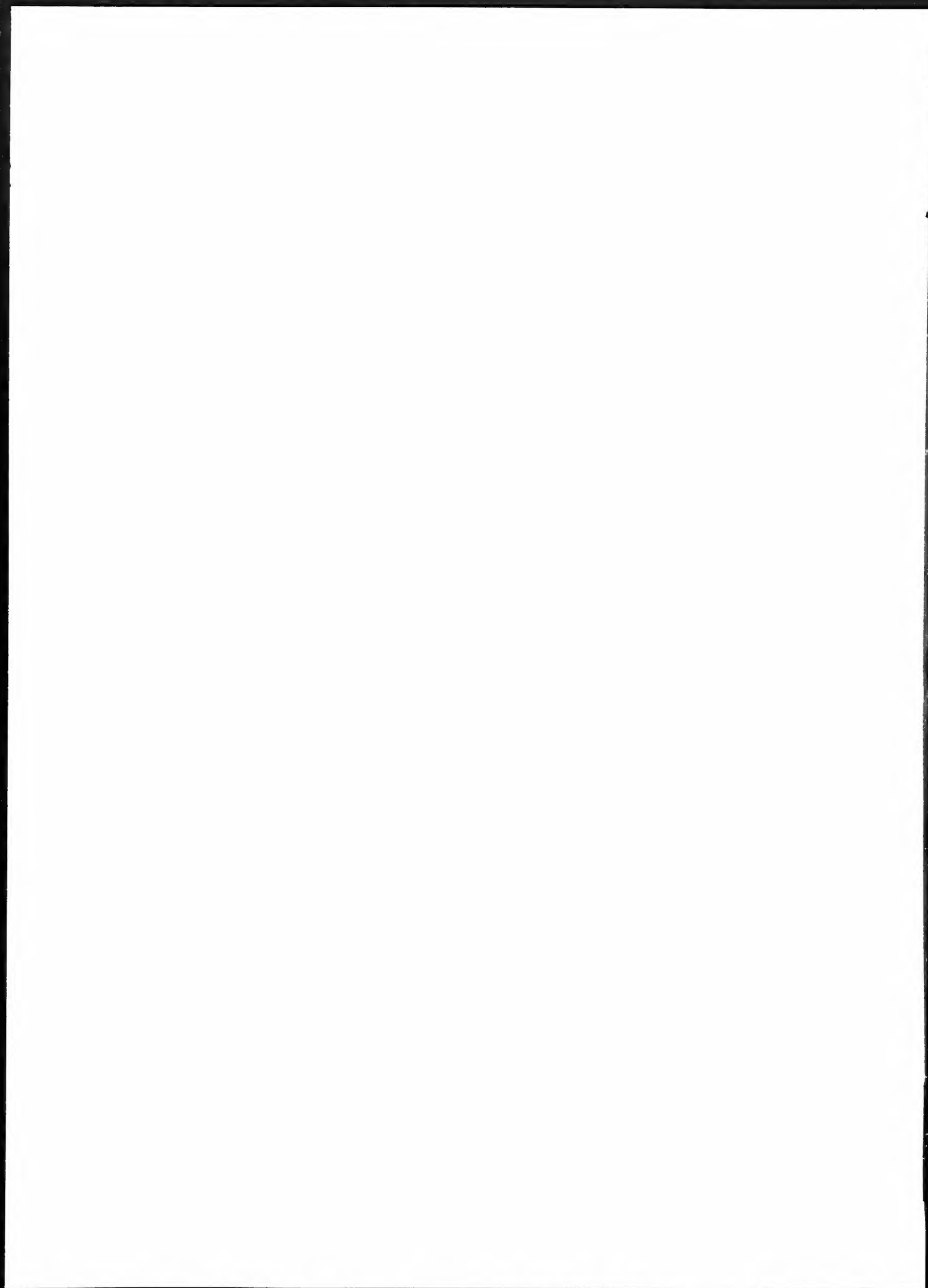
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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term  
Grand Jury Sworn in on January 2, 1963

|                              |   |                             |
|------------------------------|---|-----------------------------|
| THE UNITED STATES OF AMERICA | : | Criminal Case No. 600-63    |
|                              | : |                             |
| v.                           | : | Grand Jury Original         |
|                              | : |                             |
| ALLAN U. FORTE               | : | Violations: 18 U.S.C. 371;  |
| JAMES J. LAUGHLIN            | : | 18 U.S.C. 1503 (Conspiracy; |
|                              | : | Influencing Witness)        |

The Grand Jury charges:

COUNT ONE

1. That a Grand Jury was sworn in on July 5, 1961, in the United States District Court for the District of Columbia and is known and hereinafter referred to as the July 1961 Grand Jury. That on September 11, 1961 Allan U. Forte was indicted by the July 1961 Grand Jury in Criminal Case No. 741-61, United States v. Allan U. Forte, and charged in four counts, each of which charged a violation of the abortion statute of the District of Columbia, Title 22, District of Columbia Code, Section 201.

2. That a petit jury was sworn in on February 12, 1963, in the United States District Court for the District of Columbia for the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, at which trial the defendant Allan U. Forte was represented by counsel James J. Laughlin.

3. That the said Allan U. Forte and the said James J. Laughlin, the defendants indicted in this count, well knew the proceedings preliminary to and the trial of Counts One and Two of the aforesaid indictment would and did involve, among other things,

a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things:

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and
- c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

4. That commencing or on about September 1, 1961, and continuously thereafter until on or about February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, and the States of Maryland and Virginia and at other places unknown to this January 1963 Grand Jury, the said defendants Allan U. Forte and James J. Laughlin did unlawfully, wilfully, and knowingly conspire, combine, confederate, and agree together, and with each other, and with one Bernice Gross, a co-conspirator but not made a defendant herein, and with other co-conspirators unknown to this January 1963 Grand Jury, to defraud the United States and to commit other offenses against the United States, to wit, violations of Title 18, United States Code, Section 1503 (Influencing Witness), Section 1621 (Perjury), and Section 1622 (Subornation of Perjury).

5. That it was part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial, and, if she did not absent herself, then, to testify falsely to the aforesaid matters at said proceedings and trial.

6. That it was also part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting, and having reason to know well, believe, and expect that one Dorothy Lee Birge would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs a, b and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting, and persuading her to testify falsely to the aforesaid matters at said proceedings and trial.

7. That it was also part of the said conspiracy that the said defendants and co-conspirators, would and did corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia in the proceedings preliminary to, and in the trial of, Counts one and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, in the manner and by the means above described.

#### OVERT ACTS

At the time and places hereinafter mentioned, the said defendants and co-conspirators committed, among others, the following overt acts in furtherance of the said conspiracy and to effect the objects hereinbefore described and alleged.

1. On or about September 1, 1961, the defendant Allan U. Forte engaged in a telephone conversation with Dorothy Lee Birge who was then in Alexandria, Virginia.

2. On or about April 15, 1962, a co-conspirator unknown to the Grand Jury, engaged in a telephone conversation with Dorothy Lee Birge who was then in Alexandria, Virginia.

3. On or about May 15, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

4. On or about May 20, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

5. On or about May 25, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was

then in Baltimore, Maryland.

6. On or about September 10, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

7. On or about September 13, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

8. On or about September 15, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

9. On or about September 17, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

10. On or about September 18, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

11. On or about September 20, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

12. On or about October 10, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

13. On or about October 11, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

14. On or about October 11, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

15. On or about October 13, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

16. On or about October 14, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

17. On or about October 16, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

18. On or about October 16, 1962, the defendant Allan W. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

19. On or about October 18, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

20. On or about October 18, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

21. On or about October 22, 1962, around the mid-day, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

22. On or about October 22, 1962, in the mid-afternoon, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

23. On or about October 22, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

24. On or about October 23, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

25. On or about October 25, 1962, Bernice Gross met Jean . Smith in Baltimore, Maryland.

26. On or about October 26, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

27. On or about October 26, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

28. On or about October 29, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

29. On or about October 29, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

30. On or about November 5, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

31. On or about November 6, 1962, Bernice Gross met Jean Smith in Catonsville, Maryland.

32. On or about November 8, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

33. On or about November 9, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

34. On or about November 9, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

35. On or about November 13, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross.

36. On or about November 13, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

37. On or about November 18, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

38. On or about November 22, 1962, Bernice Gross met Jean Smith in Baltimore, Maryland.

39. On or about November 27, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the

defendant James J. Laughlin, who was then within the District of Columbia.

40. On or about December 1, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

41. On or about December 3, 1962, the defendant Allan U. Forte, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

42. On or about December 3, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

43. On or about December 18, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

44. On or about December 20, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

45. On or about December 22, 1962, Bernice Gross met Jean Smith in Baltimore, Maryland.

46. On or about January 7, 1963, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

47. On or about January 10, 1963, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

48. On or about January 16, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

49. On or about January 16, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

50. On or about January 17, 1963, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

51. On or about January 18, 1963, on two separate occasions, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

52. On or about January 18, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

53. On or about January 18, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

54. On or about January 20, 1963, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then in Washington, D.C.

55. On or about January 22, 1963, the defendant James J. Laughlin, who was then in Washington, D.C., engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

56. On or about January 25, 1963, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

57. On or about January 29, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

58. On or about January 31, 1963, Bernice Gross met Jean Smith in Baltimore, Maryland.

59. On or about February 7, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

60. On or about February 7, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

61. On or about February 11, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

62. On or about February 12, 1963, in the morning hours, the defendant Allan U. Forte, who was then in Baltimore, Maryland,

engaged in a telephone conversation with the defendant James J. Laughlin, who was then in the District of Columbia.

63. On or about February 12, 1963, in the morning hours, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

64. On or about February 12, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

65. On or about February 12, 1963, in the afternoon hours, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

66. On or about February 13, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

67. On or about February 14, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

68. On or about February 15, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

69. On or about February 15, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation

with the defendant James J. Laughlin, who was then within the District of Columbia.

70. On or about February 18, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

71. On or about February 19, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

#### COUNT TWO

1. The first two numbered paragraphs of Count One of this indictment are by reference incorporated into, and made a part of, this count.

2. That the said Allan U. Forte, the defendant indicted in this count, well knew the proceedings preliminary to and the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things:

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and

- c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

3. That from about September 1, 1961 to February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, the defendant Allan U. Forte, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, including subparagraphs a, b, and c thereof, the defendant, Allan U. Forte, did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial, and, if she did not absent herself, then, to testify falsely to the aforesaid matters at said proceedings and trial.

#### COUNT THREE

1. The first two numbered paragraphs of Count One of this indictment are by reference incorporated into, and made a part of, this count.

2. Paragraph number two, including subparagraphs a, b, and c of Count Two of this indictment is by reference incorporated into,

and made a part of, this count.

3. That on or about September 1, 1961, the aforesaid Allan U. Forte, the defendant indicted in this count, well knowing, believing, and expecting, and having reason to know well, believe, and expect that one Dorothy Lee Birge would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, the defendant Allan U. Forte did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting, and persuading her to testify falsely to the aforesaid matters at said proceedings and trial.

#### COUNT FOUR

1. The first two numbered paragraphs of Count One of this indictment are by reference incorporated into, and made a part of, this count.

2. That the said James J. Laughlin, the defendant indicted in this count, well knew the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid trial to ascertain;

a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;

- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith and by what means; and
- c. Whether the said Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

3. That from about April 15, 1962 to February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, the defendant James J. Laughlin, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, including subparagraphs a, b, and c thereof, the defendant James J. Laughlin, did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial, and, if she did not absent herself, then, to testify falsely to the aforesaid matters at said proceedings and trial.

/s/ DAVID C. ACHESON  
ATTORNEY OF THE UNITED STATES IN  
AND FOR THE DISTRICT OF COLUMBIA

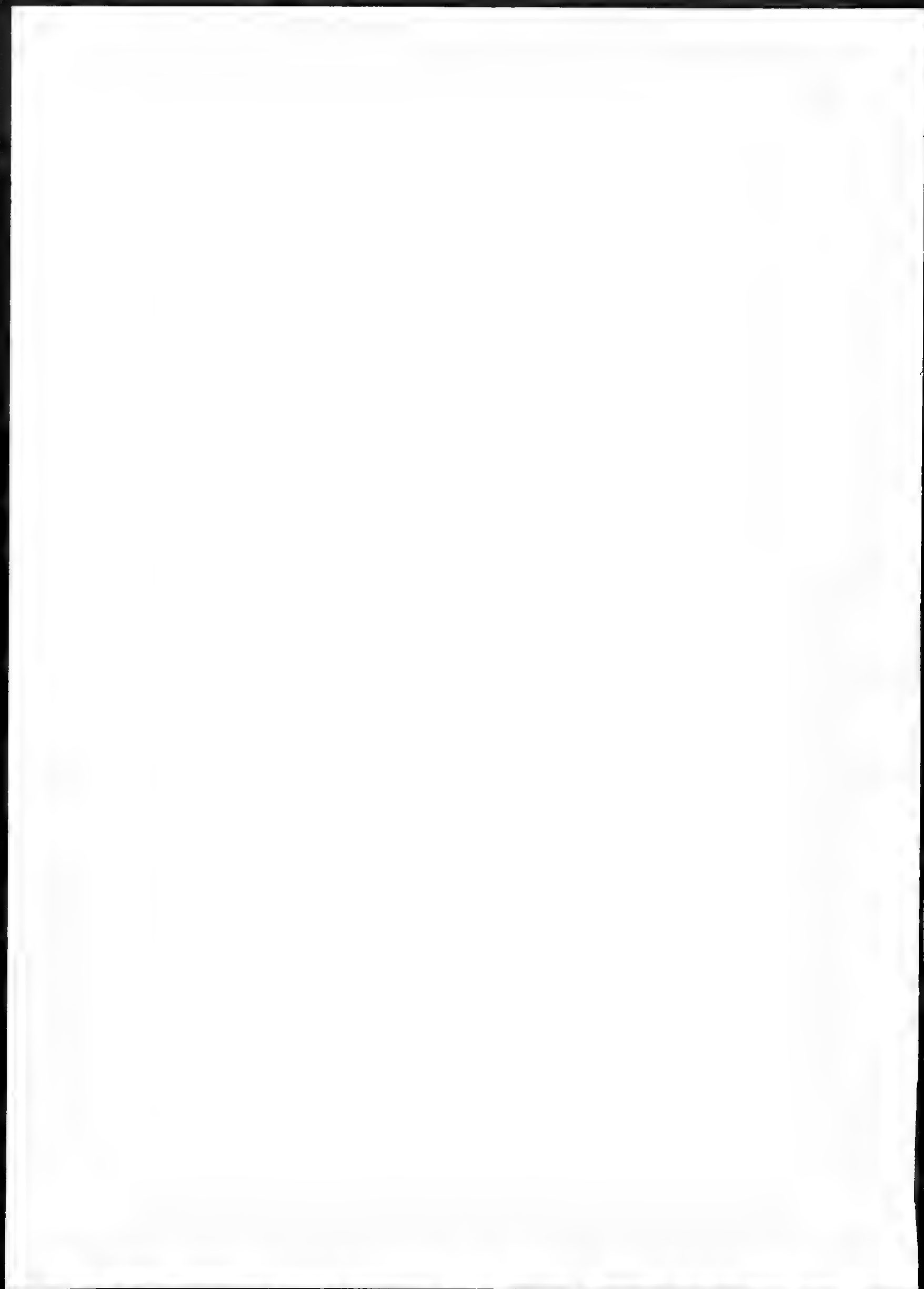
A TRUE BILL

\_\_\_\_\_  
Foreman

PAGES 17 to 22

have been deleted

in order to utilize copy from previously printed Joint Appendix



GRAND JURY BIAS

1. Playing of the unlawful recordings before the grand jury. The contents of these recordings are set forth in 1200US App. DC 93 - Laughlin v. United States and United States v. Laughlin, 222 Fed. Supl. 264.

2. Grand jury proceedings March 1, 1963 - first appearance of Mrs. Gross:

"Q Would you please tell us your full name?

A Bernice Gross.

Q And your home address?

A 2715 Uhler Avenue, Baltimore 15.

Q That is Mrs. Gross, isn't that correct?

A Yes.

Q Mrs. Gross, you are here under subpoena today, is that so?

A Yes, sir.

Q I might mention to the jury that Mrs. Gross was nice enough to come over this morning just under sort of an oral subpoena and be served here since the marshals missed her in Baltimore.

A That's right, they did.

Q In the course of a prosecution which just concluded here in Washington, Allan Forte was found not guilty of an alleged abortion committed by him in July, 1961, on a girl by the name of Jean T. Smith of Baltimore, Maryland. During the course of that trial certain allegations were made to the effect that Detective Sergeant Samuel E. Wallace of the Metropolitan Police Homicide Squad had approached Forte in August of '61, in January of '63 and again on February 6th of 1963. Forte swore under oath during the course of that trial that Wallace approached him at those times and in several phone conversations over the period from the arrest to the trial, and that in those approaches

Wallace told Forte that for a payment of two thousand dollars to Wallace he would take care of the case, or fix the case. The case being talked about is a case under our number 741-61. It was a four-count indictment; two abortions were charged, each in two different ways; one as an abortion and one attempted abortion. I don't know if you have that same statute in Baltimore or not?

A Uh hum.

Q But it was charged in that way. Prior to the trial the abortion and the two counts involving Jean Smith were severed from the abortion and the two counts involving a Dorothy Lee Birge. The matter is still pending trial; I believe the trial date is March 24, 1963, or thereabouts. In any event, Forte alleged that Wallace tried to shake him down and fix the case on trial. He alleged that for the payment of 250 dollars Wallace assured him that he, Wallace, would give Forte police protection and he could operate as an abortionist with a clean bill of health here in Washington, D.C. During the same trial there was another allegation made -- this was out of the presence of the jury during the course of a motion to suppress evidence -- and that Dorothy Lee Birge testified that Forte had called, or a man who sounded like Forte, and spoke about paying Birge 300 dollars. She said she never accepted it and that basically that was the end of it. But that charge was made during the course of the trial.

Now it will be material to the Grand Jury's investigation now under way for us to determine whether there really was an attempt to obstruct justice during the course of the trial of that case by a policeman soliciting money from Forte to fix the case -- well, by a policeman soliciting money from Forte for even if not for fixing the case, for giving Forte a clean bill of health to operate as an abortionist, or by the policeman approaching Forte for money to obstruct justice in any way regardless.

It is material and significant that the Grand Jury find out all matters and we are conducting an investigation of witnesses under oath for that purpose.

\*\*\*\*\*

"Now with each witness that comes before the Grand Jury, even if they have police experience -- we went into that with witnesses this morning -- that I'm an Assistant United States Attorney and in that capacity do tell you as a witness, which I'm sure you already know, that you

have a Constitutional right under the Fifth Amendment of the Federal Constitution to refuse to testify about a matter which might tend to incriminate you in any way. And in the Federal system we mean that you have a right to refuse to answer a question on a matter which might lead up or in the next logical series of questions open the door to a series of questions the answers to which might tend to incriminate you. So basically that is the caveat that we give to every witness that comes before us today.

Now, you do have police experience in Baltimore, isn't that correct?

A Yes, sir.

Q And you do understand that you do have the right under the Constitution to protect yourself against self-incrimination?

A Yes, sir.

Q Do you understand as I have explained it that it will be material to this Grand Jury's investigation to find out whether a member of the police force attempted to solicit money in order to fix the case or to claim that the case could be fixed, or to give Forte a license to operate as an abortionist or to obstruct justice in this matter in any way?

A Uh hum.

Q Understanding those things do you wish to invoke your right against self-incrimination or do you wish to testify?

A I'll testify.

Q Fine. Now would you tell the Grand Jury what your police experience has been, Mrs. Gross?"

\*\*\*\*\*

"Q In the abortion squad work at that time did you participate in any way in the investigation of an alleged abortion allegedly committed on Jean Smith by Dr. Forte?

A Yes, sir.

Q : Would you please tell the jury what your contact with the case was?

A : I was one of the original policewomen to take the first statement from Jean Smith in the hospital, St. Agnes Hospital, and I don't recall when we went back to her home with Sergeant Wallace -- and he was then a detective -- and a Detective Kelly, and we took another statement. Policewoman Burrell and the two men and myself. That was all."

\*\*\*\*\*

"Q Did Allan U. Forte or anyone representing himself to be acting on Forte's behalf approach you and give you any money or anything of value in return for any service or act by you concerning the alleged abortion on Dorothy Birge in '61, on Jean Smith in '61, or on Mrs. Robert Hill in 1963?

A No, sir."

\*\*\*\*\*

"Q Were you contacted by anyone representing himself to be active on the behalf of Allan U. Forte and offered money or anything of value for any act or service you might perform in connection with the matter of the alleged abortion of Jean Smith in July of 1961, Dorothy Birge in July of 1961 or the alleged abortion on Mrs. Robert Hill in January of 1963?

A No, sir."

\*\*\*\*\*

"Q Were you contacted by an attorney representing himself to be Forte's lawyer and offered any money or anything of value in return for any service you might perform in connection with the alleged abortion of Jean Smith in July of 1961 --

A No, sir."

\*\*\*\*\*

"Q Other than the pay check you received from the police department for your official duties did you receive any money or anything of value for anything you did do in

connection with the alleged abortion committed by Forte in July of 1961 on Jean Smith?

A No, sir."

\*\*\*\*\*

"Q Mrs. Gross, that concludes our series of questions, and the procedure we are following today is to take care of all witnesses and in case the Grand Jury has any questions based on what they have heard, the witness will be called back. Now we do have some additional two witnesses, one based on some information which we received ... and -- well, I discussed it on the phone with you last night, to the effect that Mrs. Smith -- well, just for the information of the Grand Jury, when we spoke on last evening we wondered about what possible reason there could be for the jury coming back not guilty in the case involving the alleged abortion of Mrs. Smith.

A That's right.

Q And I suggested that Mrs. Smith's answers in the trial weren't those strong forceful answers they could have been; there was a little bit of hesitation. And always in an abortion case there is embarrassment. Mrs. Smith, as I told you jurors before, has some four children and there is embarrassment that comes from that and coming to testify.

A That's right."

\*\*\*\*\*

### 3. Interrogation in Mr. Hannon's office. (March 1, 1963)

After Mrs. Gross testified before the grand jury on her first appearance she was taken to the office of Assistant United States Attorney Hannon where she was questioned for some two hours and a half. Mr. Sullivan joined in the questioning. Mrs. Gross was without benefit of counsel. It was apparent that Mrs. Gross was unaware of just what was going on. We refer now to proceedings in the office of Mr. Hannon:

"MR. SULLIVAN: Mrs. Gross, I have asked the reporter to stay. I want to say the same things I said in the Grand Jury to you again. We want your cooperation from you very

much, but first of all, just like I did in the Grand Jury, you have a perfect right under the Fifth Amendment to say I don't want to say anything. It is a perfect right you have. No one can hold it against you, even if it is a question that leads up logically to another one that is going to get you in trouble.

After Sullivan made this statement, Mrs. Gross said:

"MRS. GROSS: I don't want that. I had that once. I told you.

MR. SULLIVAN: Yes.

MR. HANNON: I think the record should show that we are in my office, Room 3449. I am Joseph M. Hannon, Assistant United States Attorney."

\*\*\*\*\*

MR. SULLIVAN: Well, this is it. In the Forte trial just finished up we believe that we have considerable evidence, considerable important evidence that Forte tried to pay off some witnesses. So the evidence we have we believe that -- well, for instance, after the conclusion of the trial Forte's lawyer called you, said he was dissatisfied with how much you didn't help out in the case, Jean Smith came and testified, and so on. The evidence we have is pretty clear. We have evidence that you paid out certain money on behalf of them; certain money was received from you in order to get witnesses to lie or to try to get out of coming to trial, to tell a lie on the stand. For instance, Jean Smith didn't recognize Forte at all; that he wasn't the one that performed the abortion.

MRS. GROSS: That is not true. No, that is not true.

MR. SULLIVAN: Your answers then in the Grand Jury are just absolutely clear. There is no doubt about what you said. You said in there you understood what we were investigating and you knew it was an investigation to get truthful answers. That is all we want to do.

MRS. GROSS: Well, that is not true. I'll tell you the same thing I did the Grand Jury. I don't know anything, and that is it. Not a thing.

MR. SULLIVAN: Well, here's the thing, Mrs. Gross. We want your cooperation. I'm not saying you're not being truthful about that now but I'm saying we are sure of certain things. We are sure of that call of Forte's lawyer after the trial when he said he was dissatisfied.

MRS. GROSS: No, that isn't true; that isn't true.

MR. SULLIVAN: Someone said he was Forte's lawyer, someone you thought was?

MRS. GROSS: No; no.

MR. SULLIVAN: You don't have to say anything about it at all, not a single word, but here's the proposition I want to make to you. We want your truthful testimony, we want it very badly because we want to know who is putting up the money in this case to get witnesses to skip out on the trial or to come to the trial and lie. We want to know that very, very badly, and we know certain approaches --

MRS. GROSS: Well, has anyone skipped out? Have they? I really don't know. I really don't. Who has?

MR. SULLIVAN: Well, the question is, who tried to get people to skip out? Who paid money for what? A lot of people get involved when people try to work out a little scheme to get somebody to lie, and, for instance, if someone put up a little bit of money to contact you, for you to pass on money to Jean Smith, so many people get to know something like that that you can get caught in a bind.

MRS. GROSS: I was caught one time, Mr. Sullivan. I told you. I was caught in the police department. And I think I -- I know I got a raw deal at that time.

MR. SULLIVAN: But that had nothing to do with this.

MRS. GROSS: No, but you know what it leaves on you, it leaves a mark on you and you don't forget it that easily. I never thought I would have to go through this in length again as I did that one time last year. Believe me, I mean that's the truth; I had it then, understand? I thought I could never take anything again; nothing. I don't think I could; I really can't.

MR. SULLIVAN: I'll say this to you. When I talked on the phone last night, and Mrs. Gross and I talked earlier in the case, it has been such a pleasant relation that I feel bad because I have evidence that you are not telling the truth. I feel bad for you because there are things, and the answers you just gave in the Grand Jury there were clear answers, they were understandable answers, no equivocation. You said you realized the questions were material. You said you understood you had a right under the Fifth Amendment --

MRS. GROSS: Yes, but --

MR. SULLIVAN: You said you wanted to testify. You did testify and the Grand Jury is in position to be able to deliberate as to whether you committed perjury. I want you to know perjury over here carries a two-year minimum jail sentence and a maximum of ten. There is no sense of you getting caught in a bind if you can put the finger on who put this money up. Now we have evidence and it is a simple thing. It is tough for someone to spin somebody who has been given money. It's tough. But don't get caught in a bind yourself.

MRS. GROSS: No, the questions that were asked were mainly about Wallace, and I don't know anything about Wallace.

MR. SULLIVAN: But the questions that were asked you about whether you knew Forte's lawyer, whether Forte's lawyer contacted you --

MRS. GROSS: He had so many lawyers during this 18 months. Am I right or wrong?

MR. SULLIVAN: -- and whether Forte's lawyer gave you some money --

MRS. GROSS: No.

MR. SULLIVAN: -- for something you were to do in the case.

MR. HANNON: Are you saying you might know one of his lawyers but you don't know all his lawyers?

MRS. GROSS: I understand he had a few before this last one came up. I don't know if I'm right or wrong, because I remember in Baltimore where he had seven.

MR. SULLIVAN: Jimmy Laughlin called you in the last several days, didn't he?

MRS. GROSS: What is it that you want out of me, and what will happen to me?

MR. HANNON: The truth.

MRS. GROSS: I know, but I told the truth once before, too. I mean if you can't understand my position.

MR. SULLIVAN: I think I do.

MRS. GROSS: Do you? Because you're not familiar with what happened in Baltimore. You haven't any idea.

MR. SULLIVAN: I'm not, but someone in whose judgment I have some respect said something that made me have a little bit of understanding, and another person, Lorraine Burrell, in there when I said isn't Mrs. Gross off the force now, the way Mrs. Burrell answered -- she seems to be pretty straight and honest; she wouldn't even talk about it. It seemed to impress me that maybe you did get a raw deal.

MRS. GROSS: I did. I say when it happened to you once, and which I told everything that was happening and I was the only one that was dismissed, it stays with you.

MR. SULLIVAN: It sure does.

MRS. GROSS: Maybe you have never been in a position like that.

MR. HANNON: What Mr. Sullivan is suggesting is that you're in the switches again.

MRS. GROSS: I know, and I'm wondering what's going to happen to me.

MR. SULLIVAN: Here's what can happen. If you just simply tell the truth to the Grand Jury about who gave you the money, how much they gave and what they wanted you to get Jean Smith to do, I will tell the Grand Jury that our position is that a wrong has been committed, somebody tried to get a witness taken care of, a lot of money was spent on it, and without your testimony the whole thing falls apart.

MRS. GROSS: Then what will happen?

MR. SULLIVAN: Here's what will happen. I will say to that Grand Jury the U.S. Attorney's Office considers this to be about the dirtiest thing that has happened in a long time in a trial over here, there's been money passed out in the Jean Smith trial, Birge ---

MRS. GROSS: I don't know about it. I never met her. I don't know anything."

\*\*\*\*\*

"MR. SULLIVAN: If you tell the truth about what happened in the Smith thing -- I'm the DA that will be handling the Grand Jury; Mr. Hannon came in on it -- and I will say to the Grand Jury alone, or I'll say it with you present, I'll ask the Grand Jury to consider this fact: It is an important case where these people tried to get witnesses paid off, there's a lot of money being spent; justice can't work out if people are paying money like that; everything fails if the oath fails; but, Grand Jury, there is one thing you have got to do, give us this witness for trial; we need Mrs. Gross; without her we have nothing, with her we have got something; indict the big fish and let Mrs. Gross be a government witness; without her we have got nothing.

MRS. GROSS: In other words, if Jean Smith had gotten any money would she have testified? If she had gotten anything would she have testified the way she did? Truthfully?

MR. SULLIVAN: She did. Mrs. Smith got several sums of money; later came over here to Washington trying to get out of the case. The specific suggestion was made to her, say your baby is sick tomorrow and you don't have to go. What will I do next time, Mrs. Gross? Next time say you are sick. This thing will be taken care of, it will never go to trial. You say when you get on the stand, Mrs. Smith, you don't recognize Forte. I'm not going to lie, but these letters are written, the gifts of money are made.

MRS. GROSS: Who was supposed to have made the gifts of money?

MR. SULLIVAN: That's what we're hoping you're going to tell the truth about. Well, you passed money on. We know that.

MRS. GROSS: Did I get anything from it?

MR. SULLIVAN: Yes, you did.

MRS. GROSS: I wish I had.

MR. SULLIVAN: Well the last time you didn't. You didn't get it when Laughlin complained he was disappointed.

MR. SULLIVAN: No, Laughlin never complained to me.

MRS. GROSS: Did I get any money? Am I supposed to have gotten money?"

\*\*\*\*\*

MR. HANNON: But you're complaining?

MRS. GROSS: No, I'm not complaining. Don't mix me up, please.

MR. SULLIVAN: We don't want you mixed up, all we want is the simple unvarnished truth.

MRS. GROSS: Am I on trial or what?

MR. SULLIVAN: That is your choice.

MR. HANNON: Mr. Sullivan has indicated it is your choice. If you want to talk to a lawyer you are free to talk to the lawyer. I think that in your experience -- you're an experienced policewoman, aren't you? I should say you're in the switches."

"MR. SULLIVAN: I want to level with you. If you tell the truth about what happened you're not going to get in trouble because I'm going to tell the Grand Jury without you there is no chance of our making the case on the big fish; there is no possibility -- there is a very small possibility, but without you we can't do it.

MRS. GROSS: What's this got to do with Mr. Wallace?

MR. SULLIVAN: The accusation was made against Mr. Wallace; it was a lie; Forte made it up; we know how the story got made up. Now we know; know everything; baby's layette, pink shopping slip, the whole story; the change you kept out of that when payment was made; how much was the gift."

\*\*\*\*\*

"MR. SULLIVAN: Until I know you're on the right team --

MRS. GROSS: I don't want to be on the wrong team, believe me I don't. I was never involved criminally in anything, never, and I don't intend to start now, believe me."

\*\*\*\*\*

"MR. SULLIVAN: We have something. I'm not going to tell you if you decide to go back to Laughlin and that crowd."

\*\*\*\*\*

"MRS. GROSS: What is going to happen to Bernice?

MR. SULLIVAN: If you tell the truth you are going to be a government witness."

\*\*\*\*\*

"MR. HANNON: And possibly, as Mr. Sullivan said, if for example, you testified before the Grand Jury and lied to that Grand Jury, it might be if it saw fit that the Grand Jury could indict you for perjury."

\*\*\*\*\*

"MR. HANNON: Let me say this to you. \* \* \* As I see it, the picture as it presently stands, there is one question pending. Did you or did you not commit perjury when you testified before the grand jury. Now in the event that you did, and you know the answer to this, the next question is: is the Grand Jury going to indict you for the perjury that you committed if you did commit it."

"MR. SULLIVAN: Let me tell you this. If it came out the way I hoped it would today, and still hope it will, that you tell the truth, I would ask you to tell it to us first, and then when the Grand Jury comes back from lunch and after you have had lunch I will ask you to tell it to the Grand Jury. After that if you wanted to cooperate, and this would be strictly a voluntary thing, I would ask you to call the old man or Forte's lawyer, or both, and I would like to be listening in or have some detective listening in on the other extension, and we would have a case that would be so tight."

\*\*\*\*\*

"MRS. GROSS: \* \* \* I'm not a born liar. I don't lie. When it came -- sometimes you had to lie. I would lie to my husband if I had to and other little things, but I could never lie when it came to trial, really I couldn't. If it was for the defendant I would give them a break even if we got up on the stand; if it was the truth it was the truth. I couldn't, you know, like a lot of them, you know yourself, plant evidence. I could never do that."

\*\*\*\*\*

"MR. SULLIVAN: Jean said something about Laughlin, Jimmy Laughlin, the lawyer, saying he was disappointed in the fact that Jean did come forward and testify and for that reason you didn't get anything the last time.

MRS. GROSS: I don't know. My dealings were with the old man.

MR. SULLIVAN: Didn't Laughlin call since the trial was over, or any other lawyer?

MRS. GROSS: No, no."

\*\*\*\*\*

"MR. SULLIVAN: How about Laughlin?

MRS. GROSS: Wait a minute now. I don't remember. I really don't, whether he called or not. I really don't; I don't. I can't say for sure. I can't remember if it was after the trial or before.

\*\*\*\*\*

"MR. SULLIVAN: That's what makes some sense to her story that you called her this week and said Laughlin called you and said he was disappointed because she did come and tell the truth on the stand during the trial, and that meant you were going to get just dropped and didn't get anything."

\*\*\*\*\*

"MR. SULLIVAN: Did Laughlin know about the money passing hands?

MRS. GROSS: I don't know whether he knew -- I can't say whether he knew or not because I never got anything from him.

MR. SULLIVAN: Did Forte ever say Laughlin was in on it?

MRS. GROSS: No."

\*\*\*\*\*

"MR. SULLIVAN: Did Forte ever say whatever you do don't tell so and so about this. Did he ever name anybody you should tell, such as Laughlin or anyone else?

MRS. GROSS: No, our conversations were so vague, maybe two-faced with me; he was always in and out and when he called it was just whatever he wanted me to tell Jean and that was it.

\*\*\*\*\*

"MR. HANNON: All right, did Laughlin then call you?

MRS. GROSS: Called me one time.

\*\*\*\*\*

"MR. HANNON: Did Laughlin ever call you any other place?

MRS. GROSS: Did he ever call me?

MR. HANNON: Yes.

MRS. GROSS: I think he called me at work once or twice."

\*\*\*\*\*

"MR. HANNON: This is Laughlin telling you this, to have Mrs. Smith write a letter?

MRS. GROSS: Yes, to have her write a letter. I don't remember whether it was the first, second or third letter.

MR. HANNON: Did he ever tell you at any time to get Mrs. Smith to be evasive in her testimony or vague, not to identify Forte?

MRS. GROSS: No. He would tell me to get a letter written. No, no."

\*\*\*\*\*

"MR. HANNON: Did you ever see Jim Laughlin in Baltimore in connection with this case?

MRS. GROSS: No."

\*\*\*\*\*

"Q You never met Laughlin face to face?

A No

Q None of the money passed to you was passed by Laughlin?

A No."

\*\*\*\*\*

"Q Just before the Grand Jury then one final thing. You did say, didn't you Mrs. Gross, that since you have come forward and told the truth now you would also be agreeable to having someone listen in on your extension phone tonight should Forte call you?

A The only trouble with that is my husband doesn't know anything about this, and if somebody would have to tell him I --

Q -- I think in fairness I should advise you if this Grand Jury matter results in an indictment of anyone it is going to be public information anyway. The possibility of your husband learning is extremely great. You can think that over yourself as a practical person.

A I still would not like it in my house, I wouldn't

Q You see, we have no legal way of doing it except in your house?

A Well, I was not going to answer the phone this evening because I don't want to have any more conversations and I was going to New York today. \* \* \*."

\*\*\*\*\*

"Q Do you have any objection of making a telephone call to Mr. Forte before leaving Washington and chat with him on the phone, as well as one with James Laughlin and chat with him on the phone?"

\*\*\*\*\*

"A I would rather not.

Q I understand that you would rather not, but your cooperation --

A -- If I had to I would but if I don't have to I would rather not.

\*\*\*\*\*

"DEPUTY FOREMAN: Mr. Sullivan, I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we can. I think you can tell this witness and any other witness, in or out of this room that we'll go after him. We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.

MR. SULLIVAN: Thank you, Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?

A Okay."

\* \* \* \* \*

"Q You didn't indicate to Jean Smith at that time that you would talk to Mr. Laughlin by name?

A Never; never mentioned his name; never.

Q Was there any conversation between you and Mr. Laughlin in that fifteen minute phone call to the effect that Jean Smith would say anything about not having the abortion done by Forte? Or not have had it done by Forte?

A No."

\* \* \* \* \*

"Q Did you tell Laughlin that, too?

A No, I never told him that; no."

4. Testimony of Samuel E. Wallace before the Grand Jury March 26, 1963. Before outlining the pertinent parts of this testimony and to show how it is relevant to the matter of bias of the grand jury, some explanation is necessary. It has been demonstrated that the grand jury was to investigate alleged instances of obstruction of justice. There was included in this the allegation -- based on the sworn testimony of Dr. Forte in Criminal No. 741-61 that Officer Wallace had solicited a bribe. Of course, it goes without saying that it was assumed that it would be a good faith inquiry. Therefore, Wallace being a target of investigation it would go without saying that Wallace would have no part in

the inquiry. It is of course well known that there is no rule, ancient, medieval or modern, that permits a man to investigate himself.

Wallace to our surprise was "running errands" for Mr. Sullivan and bringing witnesses before the grand jury. Of course it was natural to assume that if Wallace could ingratiate himself before the grand jury -- and under the coaching of Mr. Sullivan -- the grand jury would soon forget about indicting him. In Wallace's testimony before the grand jury on March 26, 1963, it is apparent that Wallace was entrusted by Mr. Sullivan with an errand that should have been delegated to someone else. In fact his whole appearance on that occasion was unnecessary. In any event we now refer to the pertinent parts:

EXAMINATION ON BEHALF OF THE GOVERNMENT BY MR. SULLIVAN:

"Q Sergeant Wallace, would you state your full name for the record once more.

A Samuel E. Wallace.

Q You are the same Samuel E. Wallace who appeared before this Grand Jury?

A I did, sir.

Q And as a result of certain information which came to the attention of the United States Attorney from Mr. James J. Laughlin, did there come a time in the past several days that you checked out a story provided us by Mr. Laughlin that Jean Smith of the Baltimore area had a record or a reputation as a call-girl and prostitute?

A I did check it out.

Q Would you please tell the Grand Jury briefly what you did and the results of that check.

A I called Lieutenant Newcomer of the Baltimore State Police and he went to Baltimore, checked the Criminal Record Division there. He found that she had been charged, not in Baltimore, but in the County for drunk and disorderly on one occasion; and I believe it was in the early part of '62. That is the only record she had.

She also is a -- he did a thorough check, as far as the car and everything else. There was one point on her. She was listed as Jean Titcombe Smith, white, 130 pounds, birth --

Q Is that the Department of Motor Vehicles?

A Motor Vehicles, that's correct.

And the woman that was charged with drunk and disorderly was Jean Althea Smith. She was a white female; 145; but other things he had checked turned out to be one and the same.

As far as her husband goes, he is clean. We have his car. And that's about it.

Q Thank you, Sergeant Wallace.

A JUROR: Mr. Laughlin seems to be throwing around an awful lot of accusations.

Did you make any better check than this? Now, he had made an accusation here that she is a call-girl.

THE WITNESS: That's right.

\* \* \* \* \*

"JUROR: This man Laughlin has made a charge.

THE WITNESS: That's right."

\* \* \* \* \*

"A JUROR: We had this charge interjected into this case against this Hill woman, the same charge. I don't know what they are going to try to dig up on her. Mrs. Johnson came in here, and you know what she said. And I think in the future, on these witnesses we have had an awful lot of counter-charges here, and a lot of people make counter-charges when they are trying to cover up something against

themselves. And I think we should be awfully careful before we get into the record any aspersions or any innuendoes, because I think this Grand Jury wants to hold this testimony on a little higher standard than Jim Laughlin's concept of trying a law case. That's all I have to say."

\* \* \* \* \*

"MR. SULLIVAN: I believe the testimony that you might be thinking of is that of Bernice Gross, keeping a material witness in a hotel. And according to Mr. Laughlin's testimony, at that point, when Gross was supposed to keep the witness in the hotel, they left the hotel room and went around the block, and as a result of that activity, Mrs. Gross left the force.

That's my recollection. I don't know if there is anything in addition to that."

\* \* \* \* \*

"THE WITNESS: I called Mrs. Smith, I asked her the circumstances of the arrest. She said she is the one that She and her husband were having a family argument, and the neighbors called the police. And that's it.

A JUROR: So it's a long way from being a call-girl.

THE WITNESS: A long, long way."

We believe it is well to point out here that there is in the record in this case (page 29 proceedings April 14, 1964 - Criminal No. 600-63) where Mr. Sullivan's version is disputed. Appellant Laughlin testified as follows:

"Mr. Sullivan called me and said, 'I have information - information has come to me which I haven't been able to verify, that Jean Smith was at one time a call girl. Do you have anything to base that on?'

My reply was that I did not know Jean Smith. I never saw her until the day she appeared in court in the courtroom of Judge Tamm . . . at no time did I represent

to Mr. Sullivan that I had information to the effect that she was a call girl. It was he who made the statement. And then I said, 'Well, you have the resources at your disposal which I don't have. You have the resources of the Police Department, you have the resources of the Federal Bureau of Investigation and I would ask that you check into it.' So the version that was given to the grand jury was wholly incorrect and it did not originate with me."

Mrs. Gross appeared again before the same grand jury on March 18, 1963. We find at page 68:

"MR. SULLIVAN: Do you think that Mr. Laughlin probably had something to do with it.

MRS. GROSS: I don't think Mr. Laughlin was his attorney at the time."

At page 153 before the same grand jury we have this statement by the Deputy Foreman:

"Now we have evidence here that Forte, and I'm not going to call him a doctor, he's not a doctor -- that Forte was bribing people to get their testimony changed or refrain from giving testimony. Now are you trying to create the impression with us that Forte's doing all this; that Jim Laughlin is a perfectly innocent naive somebody that doesn't know anything about this."

Of course, it is apparent that the Deputy Foreman did not know appellant Laughlin nor did he know how he tried a law case. He also did not know Dr. Forte. As a matter of fact, Dr. Forte did have a degree in physical therapy. Therefore, the Deputy Foreman had to acquire his information from other sources in the grand jury room.

We have already alluded to the unlawful recordings. We have in mind the recordings between Mrs. Gross and appellant Laughlin - already ruled to be in violation of the Federal Communications Act. It seemed that the Assistant United States

Attorney took a special delight in playing these recordings at every opportunity before the grand jury. This is best illustrated when we refer to an incident during the course of the testimony of Joyce Johnson before the grand jury. This is the same grand jury and Joyce Johnson was a target of investigation in that it was contended that she was trying to obstruct witnesses. The record in this case contains the testimony of Joyce Johnson. The witness Johnson was testifying when the noon recess was taken. Then at page 96 we find this:

(The Grand Jury reconvened at p.m.)

"MR. SULLIVAN: While we are waiting for the witness, Mrs. Johnson, I will play this tape of the telephone conversation.

(At this point in the proceedings a tape of a telephone conversation between Bernice Gross and James J. Laughlin was played before the Grand Jury.)

MR. SULLIVAN: Now ladies and gentlemen of the Jury, you have just heard the tape which Mrs. Gross has told me outside of the Grand Jury that she made today with Mr. Laughlin, James J. Laughlin, the attorney. Now I know that the setup for this tape recording was here in the United States Court in Washington on this EKO Tape Machine, and that it was made in the presence of members of the police force of Washington here with Mrs. Gross' consent when she called Laughlin's number in Washington.

Now you will note that in that conversation you just heard, there was some reference made to the question did Gross and Smith and Laughlin meet at his office. If you recall, that question was asked specifically of Laughlin the other day when he was before this Grand Jury.

Now as I indicated to you then by the way of introduction, maybe I didn't do it specially enough. Let me emphasize it now. That there is absolutely no evidence that Laughlin, Gross, and Smith met in his office. That didn't happen so far as we know. Just

like Laughlin said, it didn't happen. But I would suppose that having asked that question, Mr. Laughlin, if he had something to hide, would suppose that we didn't know what the real truth was and that we were bluffing. That we were fishing in the dark when the question was asked of him emphatically, isn't a fact that you and Gross and Smith met in your office.

So if he did have something to hide, and if he did think we were bluffing about how much we knew about the truth, perhaps that's the reason he came forward then and made the other statements he did.

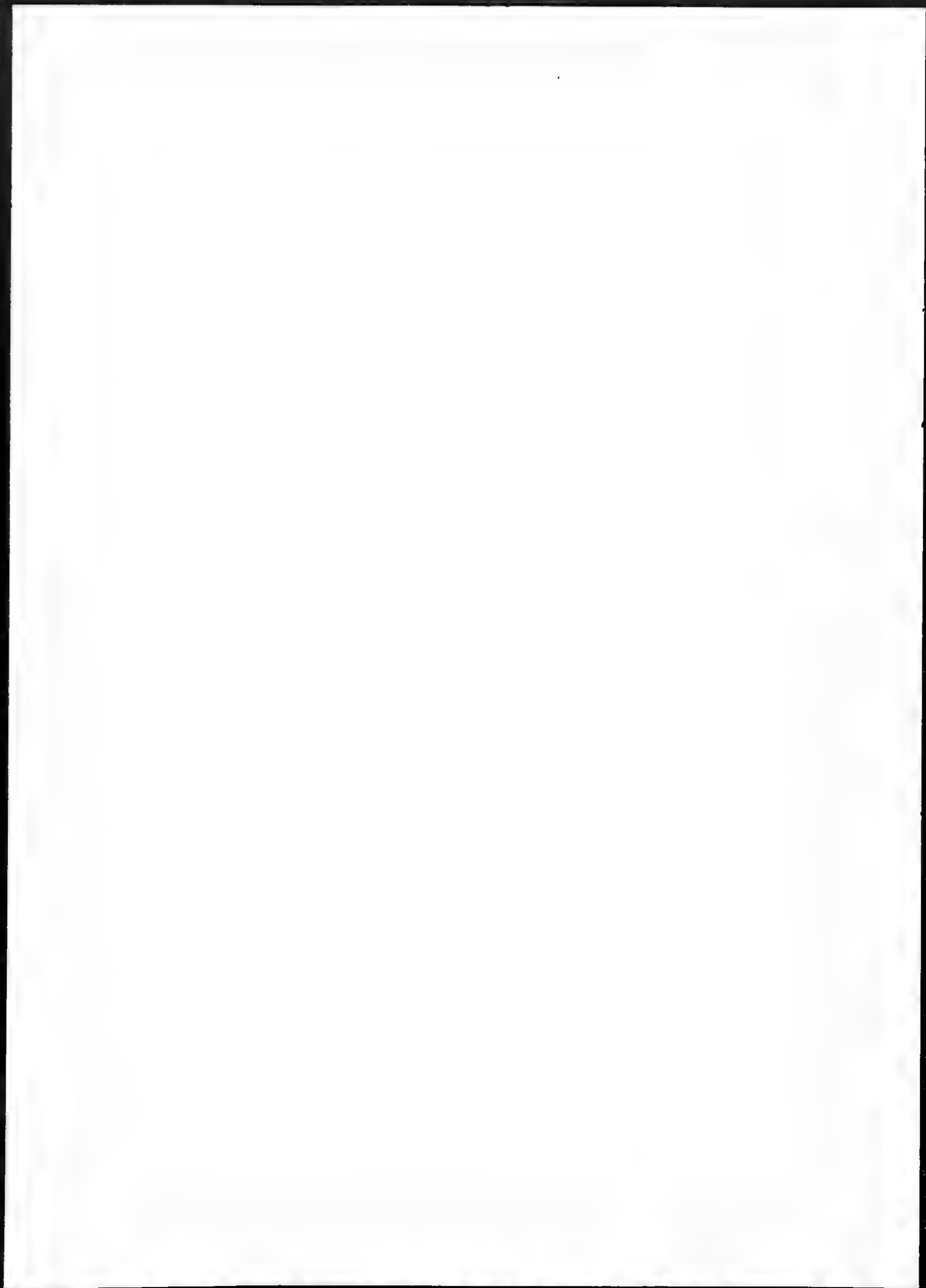
But I wanted the record to be clear and each individual to know that we are not saying that those three met here in Washington at the National Press Building.

Is it any wonder that Judge Youngdahl on two occasions said he was "shocked" when he read the statements of the Deputy Foreman and Mr. Sullivan.

PAGES 45 to 60

have been deleted

in order to utilize copy from previously printed Joint Appendix



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

v. : Criminal No. 600-63

ALLAN U. FORTE, Et al :

MOTION TO DISMISS THE INDICTMENT

Now come the defendants and move the Court for an order dismissing the indictment in this cause for the reason that the United States Attorney and his assistants have abused grand jury process in bringing the witness Bernice Gross before a grand jury in March 1964. Defendants say that the purpose of the appearance of the said Gross before the March 1964 grand jury constituted a dress rehearsal inasmuch as the questions propounded to her were the same questions propounded to the said Gross in March of 1963 and in a certain proceeding before Judge Youngdahl in October 1963. The Federal Rules of Criminal Procedure clearly set forth the outline and scope of discovery proceedings.

We ask, therefore, that there be a full and complete hearing in this cause with testimony taken to determine the facts and if it is found that the grand jury process was not used for a proper purpose, that the indictment should be dismissed. Attention of the Court has been called to the recent opinion of the Second Circuit in United States v. Dardy.

/s/ William J. Garber  
William J. Garber  
Counsel for Defendant  
James J. Laughlin

/s/ James J. Laughlin  
James J. Laughlin  
Counsel for Defendant  
Allan U. Forte

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :  
v. : Criminal Case No. 600-63  
JAMES J. LAUGHLIN :  
and :  
ALLAN U. FORTE :

DEFENDANTS' INSTRUCTION No. 1

To find the defendants guilty of the conspiracy charge in Count 1, the Government must prove beyond a reasonable doubt that it was a part of the conspiracy that the defendants Allan U. Forte and James J. Laughlin did unlawfully, willfully and knowingly conspire, combine, confederate, and agree together, and with each other, and with one Bernice Gross, a co-conspirator but not made a defendant herein, and with other co-conspirators unknown, to defraud the United States and to violate the following sections of the United States Code:

Section 1503, Title 18 (Influencing Witnesses);  
Section 1621, Title 18 (Perjury);  
Section 1622, Title 18 (Subornation of Perjury)

and the Government must also prove beyond a reasonable doubt that the said defendants Allan U. Forte and James J. Laughlin, Bernice Gross and others, did corruptly endeavor to influence Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then to absent herself from the said proceeding and trial and, if she did not absent herself,

then, to testify falsely to the aforesaid matters at the said trial in United States v. Allan U. Forte, Criminal No. 741-61.

DEFENDANTS' INSTRUCTION No. 2

A mere meeting between the defendants cannot be construed as the beginning of a conspiratorial relationship.

DEFENDANTS' INSTRUCTION No. 3

In other words, in considering whether or not one or both defendants on trial was or were members of the conspiracy charged, you must do so without regard to, and independently of, the statements, acts and declarations of others in his absence.

DEFENDANTS' INSTRUCTION No. 4

Mere association or acquaintanceship of one defendant with another does not establish the existence of a conspiracy.

DEFENDANTS' INSTRUCTION No. 5

Mere association of one of the defendants with the other defendant, or a co-conspirator, does not establish the existence of the conspiracy or the participation of either or both therein.

DEFENDANTS' INSTRUCTION No. 6

The Government must prove beyond a reasonable doubt that the purpose of the conspiracy was to obstruct the due administration of justice in connection with an investigation pending before a Federal grand jury in this district.

DEFENDANTS' INSTRUCTION No. 7

There are a number of steps which you must follow in order to determine whether one or both of the defendants were members of a conspiracy. First, you must find that there was a conspiracy. A conspiracy has been defined as a corrupt agreement or a partnership in crime. Second, you must consider all the evidence directly relating to each defendant in order to determine whether he was a member of such a conspiracy. In determining whether he was a member or not you cannot consider any conversations which were had when he was not present. In determining whether he was a member you cannot consider any acts done by others in his absence. Third, only if you find beyond a reasonable doubt that a conspiracy existed and that one or both of the defendants were members of this conspiracy can you consider conversations of and acts done by the defendant or defendants whom you find to be a member or members of the conspiracy or alleged co-conspirators against such absent defendant.

DEFENDANTS' INSTRUCTION No. 8

The jury is instructed that in determining whether the defendant Laughlin was a member of the conspiracy, if in fact you find such a conspiracy existed, you are instructed as a matter of law that his membership in the alleged conspiracy cannot be proved against him by evidence consisting of only the conduct and statements of his alleged co-conspirators, Gross and Forte, in his absence, and if you have a reasonable doubt about

this you must give the benefit of this doubt to the defendant and find him not guilty on this count.

DEFENDANTS' INSTRUCTION No. 9

I want to caution you that mere association with one or more conspirators does not make one a member of the conspiracy. Nor is knowledge of the conspiracy, without participation therein, sufficient to constitute membership. What is necessary is that a defendant knowingly participate with knowledge of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful ends and if you have a reasonable doubt from all the evidence as to whether the Government has established all of these matters, then the Government would not have sustained its burden of proving that defendant was a knowing member of a conspiracy and it would be your duty to find him not guilty on that count.

DEFENDANTS' INSTRUCTION No. 10

The jury is instructed that individuals, including the defendants, associated with each other by personal meetings, by telephone conversations and written communications does not in and of itself establish their participation in a criminal conspiracy.

To establish participation in a criminal conspiracy it is necessary to prove beyond a reasonable doubt that the particular defendant knowingly and willfully joined in a criminal partnership and that the illegal and criminal purpose of that partnership was known by him and agreed to by him and that he intended to further that purpose.

Even if you find that a criminal conspiracy existed, you must still determine whether each defendant willfully participated in it. It is not enough merely to find that any of the acts of that defendant furthered the object of the alleged conspiracy. If the defendant unwittingly served as a means to accomplish the object of the unlawful agreement or, with respect to the defendant Laughlin in properly representing his client some of his acts may have unknown to Mr. Laughlin furthered the objects of the conspiracy, that would be insufficient to convict the defendant and you would be required to acquit him on the conspiracy count and if you have a reasonable doubt about it, you would have to give him the benefit of that doubt and find him not guilty.

DEFENDANTS' INSTRUCTION No. 11

To find either defendant guilty of conspiracy you must find that he actively participated therein. Mere knowledge of an illegal act on the part of a co-conspirator is insufficient. Mere association of one defendant with another does not establish the existence of a conspiracy.

DEFENDANTS' INSTRUCTION No. 12

You are instructed that if you find that every circumstance relied upon as incriminating is susceptible of two interpretations, each of which appears to be reasonable, and one of which points to a defendant's guilt, the other to his innocence, it is your duty to accept that of innocence and reject that which points to guilt.

DEFENDANTS' INSTRUCTION No. 13

You are instructed that any admission made by the co-conspirator Gross on or after March 1, 1963 can be considered by you only in connection with the participation of the co-conspirator Gross and cannot be used against the defendant Laughlin.

In this connection it is necessary to instruct you as to why such an admission against interest made by a conspirator or co-conspirator cannot be used against the others. It is as the law describes it, an admission against interest which a person ordinarily would not make. However, if such a person after the termination of the conspiracy and his or her appearance before a grand jury implicates other defendants or conspirators in such admission, it is not evidence against the others because as to the other defendants it would be nothing more than hearsay evidence.

Delli Paoli v. United States

352 U.S. 232; 77 S.Ct., 294.

DEFENDANTS' INSTRUCTION No. 14

You are further instructed that the Government has the burden of proving beyond a reasonable doubt that the defendant joined the overall conspiracy charged in the indictment with knowledge of its common, unlawful objective and with the specific intention to assist the conspiracy to achieve its wrongful goal. Where a defendant associates with persons engaged in conspiracy that association per se, by and of itself, does not make a defendant a co-conspirator. Even if the defendant participates in a single isolated illegal transaction with persons who are engaged in a conspiracy, that participation per se, by and of itself, does not make the defendant a co-conspirator. Therefore, after viewing all of the evidence you find that the defendant Laughlin did not knowingly participate in a conspiracy to obstruct justice or if you find that his participation was limited in this case in advising the admitted co-conspirator Gross about the contents of a certain letter, that would be insufficient to denominate the defendant a conspirator and you would be required to find him not guilty on that count.

DEFENDANTS' INSTRUCTION No. 15

The jury is instructed that all evidence of an admitted perjurer should be considered with caution and weighed with great care.

DEFENDANTS' INSTRUCTION No. 16

The jury is instructed that if and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made outside of court by one person may not be considered as evidence against any person who was not present and heard the statement made.

DEFENDANTS' INSTRUCTION No. 17

In connection with the testimony of the witness Bernice Gross, you are instructed that she has testified that she was interrogated for several hours in the office of Assistant United States Attorney Hannon and that she was fearful that if she did not cooperate with the United States Attorney she would be indicted for perjury. Therefore, it is for you to consider whether the testimony of the said Gross, in view of her testimony on the stand in this case, is entitled to any credence whatsoever.

DEFENDANTS' INSTRUCTION No. 18

You are instructed of course that it is essential that the Government prove each and every allegation in the indictment.

DEFENDANTS' INSTRUCTION No. 19

You are instructed that an attorney on behalf of a defendant not only has the right but it is his plain duty toward his client to fully investigate the case and to interview and examine as many as possible of the witnesses involved who could assist him in ascertaining the truth concerning the event in controversy. Witnesses are not parties, and should not be partisan. They do not belong to either side of the controversy. They may be summoned by one or the other or by both but are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous.

The defendant James J. Laughlin as attorney for the defendant Allan U. Forte was under duty and obligation to properly investigate the facts and to interview any and all persons who might have any knowledge or could shed any light on the allegations in the indictment.

DEFENDANTS' INSTRUCTION No. 20

You are instructed that if an attorney does not properly investigate the case and does not adequately represent his client he may run the risk of condemnation by an appellate court or criticism or disciplinary action by the trial court.

DEFENDANTS' INSTRUCTION No. 21

You are instructed that there is on the statute books a provision known as Section 2255 of the New Judicial Code. This section permits an accused, if convicted, to petition the Court for relief if he contends that his constitutional rights were violated. The accused, of course, under our system of Government is entitled to effective assistance of counsel. If an accused makes an accusation that he did not have effective assistance of counsel due to inaction or carelessness on the part of his counsel, the Court can order a hearing and at such hearing the attorney could be required to testify. Therefore, it is necessary that an attorney for a defendant be always alert to make certain that the constitutional rights of his client are fully protected.

DEFENDANTS' INSTRUCTION No. 22

The defendants Allan U. Forte and James J. Laughlin are accused of conspiring to violate Section 371 of the United States Code. In other words, the Government maintains that they conspired to obstruct the due administration of justice. The Government must prove beyond a reasonable

doubt that the defendants Allan U. Forte and James J. Laughlin conspired to obstruct the due administration of justice, and if you have a reasonable doubt about this you must give the benefit of this doubt to the defendants and find them not guilty.

DEFENDANTS' INSTRUCTION No. 23

The jury is instructed that there has been testimony in this case that the witness Smith did not wish to come to Court in the case involving the defendant Allan U. Forte and that she communicated said thoughts to a Bernice Gross. There has also been testimony in the case from the alleged co-conspirator Gross that the defendant Laughlin suggested certain matters that could be put in a letter to the United States Attorney suggesting that the said Smith did not wish to appear as a witness. This testimony was received with relationship to Count 1.

The jury is instructed that Mrs. Smith, as the complaining witness, had the right to communicate her desire not to testify to the United States Attorney and Mr. Laughlin, as attorney for the defendant Forte, had the right and duty to advise said witness that she could communicate her views to the United States Attorney and that she could do so by letter and that this advice, standing alone, would not constitute any offense by the defendant Laughlin. The jury is instructed the Government would have to go further and would have to prove beyond a reasonable doubt that Mr. Laughlin did give advice with a corrupt intent as this Court has defined

that term to you, and if from all the evidence you believe that Mr. Laughlin advised the complaining witness through Gross about the writing of a letter to the United States Attorney but he did so in the representation of his client and that he was exercising his right to advise the complaining witness that she could communicate her views to the United States Attorney and did so without any criminal intent or corrupt motive, then you would have to find the defendant Laughlin not guilty and if you have a reasonable doubt about this you would have to give him the benefit of that doubt and find him not guilty.

Rosner v. United States  
2nd Circuit  
10 F.2d 675

Harrington v. United States  
8th Circuit  
267 Fed. 97

DEFENDANTS' INSTRUCTION No. 24

You are instructed that the indictment also charges that the defendants Allan U. Forte and James J. Laughlin, Bernice Gross and other co-conspirators, did endeavor to corruptly influence one Dorothy Birge by counseling, advising, suggesting, and persuading her to testify falsely to the matters set forth in Criminal Case No. 741-61, United States v. Allan U. Forte, terminating in an acquittal February 20, 1963, wherein Jean Smith was the complaining witness.

Before you could convict in this case you would have to believe beyond a reasonable doubt that the defendants Allan U. Forte and James J. Laughlin and Bernice Gross and other co-conspirators did corruptly endeavor to influence the said Dorothy Birge by counseling, advising, suggesting, and persuading her to testify falsely in Criminal No. 471-61, United States v. Allan U. Forte, terminating in an acquittal February 20, 1963. If you have a reasonable doubt about this you must give the benefit of that doubt to the defendants and acquit them.

DEFENDANTS' INSTRUCTION No. 25

You are instructed that in this case Bernice Gross has admitted under oath that she has committed many, many acts of perjury. You are instructed that in view of this you have the right to completely disregard all of her testimony.

Arbuckle v. United States  
79 U.S. App. D.C. 282, at p. 284.

DEFENDANTS' INSTRUCTION No. 26

You are instructed as a matter of law that the burden of proof is always upon the prosecution. It is not sufficient to establish a probability though a strong one, arising from the doctrine of chance, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact beyond a reasonable doubt.

McAffee v. United States  
70 App. D.C. 142 at p. 151.

DEFENDANTS' INSTRUCTION No. 27

You are instructed that specific criminal intent must exist in order for there to be a violation of Section 1503, Title 18, United States Code (Obstruction of Justice) and such specific criminal intent must be to do some act which tends to influence, obstruct or impede due administration of justice and must be done with corrupt motive and if you have a reasonable doubt as to whether the Government has proven beyond a reasonable doubt this specific criminal intent and this corrupt motive and if you have a reasonable doubt as to whether the Government has sustained its burden of proof as to such specific criminal intent or corrupt motive, you must give the benefit of that doubt to the defendants and acquit them.

Knight v. United States  
310 F.2d 305.

DEFENDANTS' INSTRUCTION No. 28

You are instructed that the Government has failed to call as a witness one Samuel E. Wallace, a police officer of the District of Columbia, who played a major part in the investigation of this case. Since the said Wallace was peculiarly available to the Government you have a right to infer that the testimony of the said Wallace, if called, would have been unfavorable to the Government.

DEFENDANTS' INSTRUCTION No. 29

You are instructed that a reasonable doubt may arise from the evidence in the case and you are also instructed that a reasonable doubt may arise from lack of evidence.

DEFENDANTS' INSTRUCTION No. 30

You have already been instructed that the witness Bernice Gross by her own testimony had admitted that she committed various acts of perjury and that when she made the answers under oath she knew the answers were intentionally false. You are further instructed that the witness Bernice Gross is an accomplice and that her testimony must be received with the very greatest care and caution and should be scrutinized by you very fully and you are instructed that you are to look for corroborating testimony before giving credence to the testimony of the said Bernice Gross.

Caminetti v. United States  
242 US 470

DEFENDANTS' INSTRUCTION No. 31

You are instructed that the witness Bernice Gross by her own testimony is an accomplice. However you are instructed that her testimony should be received with suspicion and with the greatest care and caution.

Egan v. United States  
52 App. DC 384

Freed v. United States  
49 App. DC 392

DEFENDANTS' INSTRUCTION No. 32

You are instructed that the witness Gross has testified that after she appeared before the grand jury the first time on March 1, 1963, she was taken to the United States Attorney's office and interrogated for more than two hours and at the end of the interrogation she agreed to cooperate with the Government. You, therefore, may take this factor into consideration in determining the weight to be given her testimony.

DEFENDANTS' INSTRUCTION No. 33

You are instructed that there has been testimony in this case that Detective Samuel E. Wallace has solicited the defendant Forte for a bribe and there is further testimony to the effect that the witness Gross stated that Officer Wallace had been paid off on one or more occasions in Baltimore. You are instructed that Officer Wallace is not on trial but you may take this testimony into consideration in determining the weight to be given to the testimony of the witness Gross.

DEFENDANTS' INSTRUCTION No. 34

You are instructed that the witness Bernice Gross by her own testimony is an accomplice in the alleged offenses named in the indictment and it is the law that you may convict upon the uncorroborated testimony of an accomplice, but I caution you that her testimony should be scrutinized with the greatest care and caution and you should look for corroboration as to material aspects of her testimony.

DEFENDANTS' INSTRUCTION No. 35

In connection with Forte's criminal record you are further instructed that in evaluating such criminal record as affecting Forte's credibility you may also consider the explanation given by Forte on the witness stand attenuating such conviction, including the testimony that Forte had received a pardon from the Governor of the State where the conviction was had.

DEFENDANTS' INSTRUCTION No. 36

You are instructed that Forte has testified that his relationship with the witness Gross was instigated by Gross and the purpose of their meetings and telephone conversations was for Gross to supply Forte with information concerning one Samuel E. Wallace and that money was given by Forte to Gross for the purpose of covering Gross' expenses and to pay for the information concerning Wallace. If the jury believes the testimony of Forte or if the jury has any reasonable doubt concerning the matters about which Forte testified then the jury must return a verdict of not guilty as to Forte. In other words if the jury believe that Forte was not a party to any conspiracy and did not either directly or indirectly attempt to influence the witness Jean Smith as alleged in the indictment or if the jury has any reasonable doubt as to these matters then the jury must return a verdict of not guilty as to Forte.

CHARGE TO THE JURY

Transcript of Proceedings

20th DAY

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES )

v. )

Criminal No. 600-63

ALLAN U. FORTE )

JAMES J. LAUGHLIN )

Washington, D. C.

Tuesday, June 29, 1965

Before the Honorable WILLIAM B. JONES, United States  
District Judge, the trial was resumed at 10:08 a.m. today.

Appearances:

For the United States:

Mr. JOSEPH A. LOWTHER

For the defendant Forte:

Mr. WILLIAM J. GARBER

For the defendant Laughlin:

Pro se

- - -

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## -- PROCEEDINGS --

(The jury is in the box.)

## JUDGE'S CHARGE TO THE JURY

THE COURT. Ladies and gentlemen of the jury, this case has now reached that stage where it becomes my duty to charge you on the law of the case, which charge you are required to follow in exercising your duty to pass on the facts in this case. Before going to the principles of law which must guide you in your deliberations, I want to discuss very briefly the participants in this trial and the functions which each of us has in this case. First consider counsel for the Government and counsel for the defendant, and also the defendant Laughlin. You first met them in the voir dire examination when you were selected as jurors. Subsequently the Government's counsel made an opening statement as to what the Government expected to prove, and then the defendant Laughlin made an opening statement as to what he, the defendant Laughlin, expected to prove. Those statements of what counsel for the Government and defendant Laughlin expected to prove do not constitute evidence in this case.

At the close of the case, counsel for the Government, counsel for the defendant Forte and the defendant Laughlin made what we refer to as summations to the jury. They of course did not undertake to discuss all of the evidence in the case; but they did discuss the evidence that constituted their recollection of that part of the evidence to which they thought you should give special consideration. If your recollection

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disagrees with their recollection, your recollection is controlling, as you are the sole judges of the issues of fact.

During the course of the trial there were occasions when there were colloquies between counsel, and between counsel and the Court, in connection with which there may have been statements of alleged fact. Quite obviously these statements do not constitute evidence. When I use the word "counsel" I of course speak of Government counsel and Mr. Garber, counsel for the defendant Forte, and also Mr. Laughlin who is defending himself.

Now we come to the function of the Court. It is my duty to conduct the trial of the case in an orderly, fair and efficient manner, to rule upon questions of law during the course of the trial, and finally to charge you with respect to the law which will control you in the determination of the issues of fact which you have to decide. You are not to draw any inferences, nor are you to be influenced with respect to the guilt or innocence of either defendant, by any ruling of this Court during the course of the trial. The Court has made rulings of law and thereby disposed of the questions that were presented, either dealing with the admissibility  
2304 or inadmissibility of evidence, or other questions that arose during the course of the trial. There is nothing that the Court has said during the course of the trial, or that will be said during this charge, which should carry with it any suggestion as to how the Court feels this case should be decided, because, as I shall point out to you momentarily, you are the

sole judges of the issues of fact in this case, and for me to suggest how you should decide the case would constitute an assumption of your prerogative in this case.

As I said, you are the sole judges of the issues of fact, which you must decide in this case. You must base your judgment upon the evidence which you have heard from the witness stand, the exhibits which have been received in evidence, and any stipulations which may have been made by counsel during the course of the trial, and the inferences which are reasonably deducible from that evidence, that is to say, the testimony, exhibits and stipulations.

I repeat, you are the sole judges of the issues of fact. That is your sole responsibility, and no one else can share it with you.

You must weigh and consider this case without regard to sympathy, prejudice or passion, for or against any party to the action. And although you are the sole judges of the facts, you are duty bound to follow  
2305 the law as I shall now state it to you. You are to apply the law to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but you are to consider as a whole the instructions in this charge.

These defendants have been indicted and charged with conspiracy and with obstruction of justice. A little later on I shall read the indictment to you, but at this time I wish to say and emphasize that the fact of their indictment raises no inference of guilt. The indictment is a method whereby

a defendant is brought to trial and by which he is informed of the charges against him. It is not evidence in the case.

Every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to each defendant in this case throughout the trial. The burden is on the Government to prove a defendant guilty beyond a reasonable doubt, as to every element of the offense, as those elements will be defined; and if the Government fails to sustain that burden, then you must find the defendants not guilty.

You may well ask what is meant by the phrase, "a reasonable doubt." It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty, and not necessarily proof to a mathematical certainty. A reasonable doubt is one which is reasonable  
2306 in view of all the evidence. Therefore, if after an impartial comparison and consideration of all the evidence you can candidly say that you have such a doubt as would cause you to hesitate to act in matters of importance to yourselves, then you have a reasonable doubt. But if after such impartial comparison and consideration of all the evidence, and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would not hesitate to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt.

That is an instruction concerning the burden of proof and reasonable doubt. It goes to each defendant separately.

In courts as well as in all of our affairs of life, when we are called upon to determine disputed questions of fact, there are two kinds of evidence upon which our conclusions may be based. One kind is called direct evidence, and one kind is called indirect or circumstantial evidence. Direct evidence, for example, is evidence of a witness as to what he or she saw or heard as an eyewitness of the offense under inquiry.

Indirect evidence is supplied by testimony as to facts and circumstances which tend to show that the offense under inquiry has  
2307 been committed, and by whom it was committed. In other words, circumstantial evidence is composed of proved facts which raise a logical inference as to the existence of the fact that is in issue in the particular case, and which by experience have been found to be so associated with that fact that in the relation of cause and effect they lead to a satisfactory conclusion.

Both kinds of evidence, direct and circumstantial, have been introduced into this case. Both kinds of evidence are equally entitled to consideration by a jury. Sometimes a jury may consider that indirect evidence is stronger than direct evidence. But the rule is the same as to both, whether it be direct or circumstantial, that the evidence must satisfy the jury beyond a reasonable doubt as to the guilt of a defendant, in order for a conviction to follow.

In judging the evidence you must necessarily evaluate the testimony of individual witnesses. Only thus can you determine the truth, and it is the truth which you must seek. You should bring to this task your knowledge of human matters and human nature, your ability to judge men, their source of knowledge, their intelligence, their motives, their intentions, so that you may discern the real character behind the spoken words and measure their weight of truth and accuracy. In this connection you have a right to consider the manner of testifying, whether the witness on  
2308 the stand was evasive, whether there was a tendency to distort, or whether he or she was frank and candid in his or her testimony; also whether the witness was contradicted on material facts, whether the witness has any interest in the outcome of this proceeding or its results, friendship or animosity towards persons concerned herein. Many other human factors must be considered by you which may or may not affect the desire of a witness to tell the truth, depending largely on his or her innate character. Give the testimony only that weight to which in your judgment it is entitled when tested by all these considerations and in the light of all other evidence in this case.

You may consider the reasonableness or unreasonableness, the probability or improbability of the testimony of a witness, in determining whether to accept it as true and accurate, or the contrary. In that connection you may consider the opportunity or lack of opportunity for the witness to observe or hear any of the matters to which he or she testified.

If you believe that any witness has shown himself or herself to be biased or prejudiced either for or against either side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of such witness so as to affect the desire and capability of  
2309 that witness to tell the truth. You may consider the appearance, manner, demeanor and conduct of each witness who appeared on the stand, which is simply another way of saying what we all do in ordinary life. You may consider whether the witness looked and acted as if that witness were telling the truth fully, frankly, honestly and freely, what that witness knew to be so, or the contrary.

You may take into consideration all those factors shown by the evidence which reasonable people take into consideration when they come to determine the difference between truth and untruth, of truth and half truth. In other words, you may base your verdict upon that testimony which you believe to be true.

You are not to be controlled necessarily by the number of witnesses that have come before you testifying for either one side or the other. You are instructed that the testimony of one witness entitled to full credit is sufficient for the proof of any fact and may justify a verdict, even if a number of witnesses have testified to the contrary, if upon the whole case, considering the credibility of witnesses--which I have and will discuss with you--and after weighing the various factors of evidence, you believe they point to the accuracy and honesty of the one witness.

2310 In judging of the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his or her testimony, or by evidence pertaining to his or her motives.

In this case two prior inconsistent statements of the witness Bernice Gross were received in evidence. You will recall that at the time they were received I gave you the very instruction I am giving you now:

The law provides that where at a trial the testimony of a witness is inconsistent with the statement that witness previously made, and which statement substantially varies from his or her sworn testimony in court, the inconsistent statement is admitted into evidence solely for the purpose of bearing on the credibility of the witness. Thus you may only consider the statement in connection with your consideration of the credence you are to give to the witness' testimony in court. You may not consider the inconsistent statement given outside of the courtroom as one proving as a fact what is contained in that statement.

It is the settled law in this country that accomplices in the commission of a crime are competent witnesses, and the government  
2311 has the right to use them as witnesses. In this regard I refer to the testimony of Bernice Gross. It is the duty of the Court to admit her testimony, and it is your duty to consider it. It should be received

If you believe that any witness has shown himself or herself to be biased or prejudiced either for or against either side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of such witness so as to affect the desire and capability of  
2309 that witness to tell the truth. You may consider the appearance, manner, demeanor and conduct of each witness who appeared on the stand, which is simply another way of saying what we all do in ordinary life. You may consider whether the witness looked and acted as if that witness were telling the truth fully, frankly, honestly and freely, what that witness knew to be so, or the contrary.

You may take into consideration all those factors shown by the evidence which reasonable people take into consideration when they come to determine the difference between truth and untruth, of truth and half truth. In other words, you may base your verdict upon that testimony which you believe to be true.

You are not to be controlled necessarily by the number of witnesses that have come before you testifying for either one side or the other. You are instructed that the testimony of one witness entitled to full credit is sufficient for the proof of any fact and may justify a verdict, even if a number of witnesses have testified to the contrary, if upon the whole case, considering the credibility of witnesses--which I have and will discuss with you--and after weighing the various factors of evidence, you believe they point to the accuracy and honesty of the one witness.

2310 In judging of the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his or her testimony, or by evidence pertaining to his or her motives.

In this case two prior inconsistent statements of the witness Bernice Gross were received in evidence. You will recall that at the time they were received I gave you the very instruction I am giving you now:

The law provides that where at a trial the testimony of a witness is inconsistent with the statement that witness previously made, and which statement substantially varies from his or her sworn testimony in court, the inconsistent statement is admitted into evidence solely for the purpose of bearing on the credibility of the witness. Thus you may only consider the statement in connection with your consideration of the credence you are to give to the witness' testimony in court. You may not consider the inconsistent statement given outside of the courtroom as one proving as a fact what is contained in that statement.

It is the settled law in this country that accomplices in the commission of a crime are competent witnesses, and the government  
2311 has the right to use them as witnesses. In this regard I refer to the testimony of Bernice Gross. It is the duty of the Court to admit her testimony, and it is your duty to consider it. It should be received

with caution and scrutinized with care. The degree of credibility which you should give to such testimony is a matter exclusively within your jurisdiction.

You may, as a matter of law, convict a person accused of crime upon the uncorroborated testimony of an accomplice, but you should do so only after you have carefully and cautiously scrutinized such testimony. If you find that an accomplice is substantially corroborated by independent evidence with respect to material parts of his or her testimony, you should then give the entire testimony such weight as in your opinion it deserves.

Bernice Gross has admitted that in her two appearances before the grand jury on March 1, 1963, and in her one appearance before the grand jury on March 19, 1964, she answered some of the questions falsely. You are instructed that the testimony of an admitted perjurer should be considered with caution and weighed with care.

In connection with the testimony of Bernice Gross you may also consider, in judging her credibility, whether she is in fear of prosecution, or whether she expects leniency by the grand jury and the United States Attorney's Office, and, if so, whether or not that affects her credibility in any way.

There has been evidence in this case that the witness, Bernice Gross, was paid a total of \$378.88 by the United States Marshal's Office in the District of Columbia for appearances in this district. You

are instructed that this amount of money represents witness fees to which witnesses are entitled by law, and that witness fees are required by law to be paid to any witness who appears as a witness for the government.

In this case the defendant Forte took the witness stand and testified. With respect to him you are instructed that while the law makes a defendant a competent witness in this case, yet you have a right to take into consideration his situation and interest in the results of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as in your judgment it is fairly entitled to receive.

The fact that the defendant Forte has a criminal record has no bearing on the question of guilt or innocence of the charges on which he is being tried. The law, however, admits the criminal record of any person who takes the witness stand, solely for the purpose of assisting the jury in determining whether or not to believe the witness. Any fact that may tend to show that a witness may not be a truthtelling individual  
2313 is admissible in respect to such witness, whether the witness is a defendant or anyone else. Consequently you may consider the defendant Forte's criminal record, not as bearing on the question of his guilt or innocence, because his guilt must be established by evidence, irrespective of what his past may have been. You may consider his criminal record merely for the purpose and as a help in determining whether he was a trustworthy witness when he took the witness stand and whether his testimony should be believed.

If you should find that any witness knowingly testified falsely as to any material fact about which that witness could not have been mistaken, you are at liberty, if you deem it wise to do so, to disregard the entire testimony or any part of the testimony of such witness, except where corroborated by other credible testimony.

When you retire to the jury room to deliberate in this case, you will be given a copy of the indictment to take with you. That indictment reads as follows:

"Count One.

"1. That a grand jury was sworn in on July 5, 1961, in the United States District Court for the District of Columbia, and is known and hereinafter referred to as the July 1961 Grand Jury. That on September 11, 1961 Allan U. Forte was indicted by the July 1961 Grand Jury in Criminal Case No. 741-61, United States v. Allan U. Forte, and charged in four counts, each of which charged a violation of the abortion statute of the District of Columbia, Title 22, District of Columbia Code, Section 201.

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"2. That a petit jury was sworn in on February 12, 1963, in the United States District Court for the District of Columbia for the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, at which trial the defendant Allan U. Forte was represented by counsel James J. Laughlin.

"3. That the said Allan U. Forte and the said James J. Laughlin, the defendants indicted in this count, well knew the proceedings preliminary to and the trial of Counts One and Two of the aforesaid indictment would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things:

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and
- c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

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"4. That commencing on or about September 1, 1961, and continuously thereafter until on or about February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte,

Criminal Case No. 741-61, within the District of Columbia, and the States of Maryland and Virginia and at other places unknown to this January 1963 Grand Jury, the said defendants Allan U. Forte and James J. Laughlin did unlawfully, wilfully, and knowingly conspire, combine, confederate, and agree together, and with each other, and with one Bernice Gross, a co-conspirator but not made a defendant herein, and with other co-conspirators unknown to this January 1963 Grand Jury, to defraud the United States and to commit other offenses against the United States, to wit, violations of Title 18, United States Code, Section 1503 (Influencing Witness), Section 1621 (Perjury), and Section 1622 (Subornation of Perjury).

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"5. That it was part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly

endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the government to abandon prosecution and, if prosecution were not abandoned, then to absent herself from the said proceedings and trial, and, if she did not absent herself, then to testify falsely to the aforesaid matters at said proceedings and trial.

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"6. That it was also part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing and expecting, and having reason to know well, believe and expect that one Dorothy Lee Birge would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including sub-paragraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting and persuading her to testify falsely to the aforesaid matters at said proceedings and trial.

"7. That it was also part of the said conspiracy that the said defendants and co-conspirators would and did

corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, in the manner and by the means above described.

"Overt Acts.

"At the time and places hereinafter mentioned, the said defendants and co-conspirators committed, among others, the following overt acts in furtherance of the said conspiracy and to effect the objects hereinbefore described and alleged:"

2318 THE COURT (continuing): Now, ladies and gentlemen of the jury, you are going to have this indictment with you in the jury room. There are some 71 overt acts charged. Counsel have agreed that I need not read them all to you. You will be able to read them. And, as you will hear me in a moment charge you, only one overt act needs to be proved.

So I will now, before going to Counts Two and Four of the indictment, explain to you what that Count One charging conspiracy means, and the law with respect to it.

The conspiracy statute, Title 18 United States Code, Section 371, reads as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be" punished by the penalty prescribed by the statute.

Conspiracy to commit a crime is an offense separate and distinct from the crime itself. In order to justify a conviction of a defendant on the charge of conspiracy, the following elements must be established beyond a reasonable doubt--which term I have already defined for you:

- 2319      First, that the conspiracy alleged was formed and existed at or about the time alleged;
- Second, that the defendant knowingly and wilfully became a member of the conspiracy;
- Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and
- Fourth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

A conspiracy is a combination by two or more persons to accomplish by concerted action a criminal purpose or a lawful purpose by unlawful means. In other words, a conspiracy is a partnership in crime in which each member of the conspiracy becomes the agent of every other member.

A conspiracy is created by an agreement to commit a crime. It is not necessary, however, to show that the persons charged with conspiracy met together and entered into a formal agreement. It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful design. Such an understanding need not be shown directly. Ordinarily a conspiracy is characterized by secrecy. The agreement may be inferred from circumstances, such as the conduct of the parties  
2320 and acts done by the accused persons. Such an agreement may be inferred from the fact that two or more persons are acting together in an endeavor to accomplish the unlawful result. In addition to any circumstantial evidence, you may consider any direct evidence that may have been received in this case concerning the existence of a conspiracy.

As I have said, a conspiracy may be established by circumstantial evidence or by deduction from facts. The common design is the essence of the crime, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result. If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One defendant may know but one other member of the conspiracy. But if, knowing that

others have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto.

Before a jury may find that a defendant or any other person  
2321 has become a member of a conspiracy, the evidence must show that the conspiracy was formed and that the defendant, or other person claimed to have been a member, knowingly and wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To participate knowingly and wilfully means to participate voluntarily and understandingly and with specific intent to do some act the law forbids, or with specific intent to fail to do some act the law requires to be done, that is to say, to participate with bad purpose either to disobey or to disregard the law. So if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and wilful participant--a conspirator.

One who knowingly and wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the instigators of the conspiracy.

In determining whether or not a defendant or any other person was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant

or any other person in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

2322        It is not necessary, in order to convict a defendant on a charge of conspiracy, that he shall have been a member of the conspiracy from the beginning. The joinder of a new party in a conspiracy, or the dropping out of a party to the conspiracy once it has been formed, does not constitute a new conspiracy or destroy the old one, nor does it remove the liability of the original conspiracy. Different persons may become members at different times; they may perform different parts in it; they need not be aware of all of the ramifications of the conspiracy. Each participant, however, must know the purpose of the conspiracy. If as alleged in this case a conspiracy existed, and if either defendant in this case knew of the conspiracy and purposely took some part, large or small, in carrying it into effect, he became part and parcel of it and may be found guilty of conspiracy. The fact that he may not have been in the conspiracy at its inception, or that he may have taken a minor part, or that he may not have known all of the conspirators, is immaterial, as is also the fact that he may have become a party to it at a later stage of its progress.

Now, one may become a member of a conspiracy without full knowledge of all the details. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a conspirator.

2323        You are instructed that an attorney on behalf of a defendant has

the right, and it is his plain duty toward his client, to fully investigate the case in which he represents his client and to interview and examine as many as possible of the witnesses involved who could assist him in ascertaining the truth concerning the events in the controversy. Witnesses are not parties and should not be partisan. They may be summoned by one side or the other, or both.

The defendant James J. Laughlin, as attorney for the defendant Allan U. Forte in Criminal Case No. 741-61, was under a duty and obligation to properly investigate the facts and to interview any and all persons who might have knowledge or could shed any light on the allegations in the indictment. However, a lawyer representing a client in a pending case before the Court does not have a right to conspire with anyone else to influence a witness not to give testimony in a pending case or to influence a witness to testify falsely in a case.

With regard to the conspiracy count, a mere meeting between the defendants for innocent or legitimate purposes could not be construed as the beginning of a conspiratorial relationship. Nor does the mere innocent association or acquaintance of one defendant with another establish the essence of a conspiracy.

2324        However, if and when it should appear beyond a reasonable doubt from the evidence that a conspiracy existed and that a defendant was one of the members, then the acts thereafter knowingly done and the statements thereafter knowingly made by any person likewise found to be a

member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the particular defendant, provided such acts and statements were knowingly made and done by such other person during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy. Otherwise, any admission or incriminatory statement made outside of court by one person may not be considered as evidence against any other person who was not present and did not hear the statement made.

In your consideration of the evidence in this case as to the offense of conspiracy charged in the first count of the indictment, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you find that the government has proved beyond a reasonable doubt that such conspiracy did exist, you should next determine whether the defendant Forte and the defendant Laughlin, or either of them, knowingly and wilfully became a member of the conspiracy.

2325        If it appears from the evidence beyond a reasonable doubt that the conspiracy was knowingly and wilfully formed as alleged in the indictment and that the defendants, or either of them, wilfully became a member of the conspiracy, at the inception of the plan or scheme or at some period after the inception of the plan or scheme, and that thereafter one or more of the conspirators during the existence of the conspiracy knowingly committed, in furtherance of the object or purpose of the conspiracy, one or

more of the overt acts charged in Count One of the indictment, then the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

By the term "overt act" is meant any act committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. In fact, it may be an innocent act. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and it must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment. It is sufficient to prove that a single overt act occurred in the District of Columbia, even though several overt acts are alleged in the indictment. In this connection you are instructed that a conversation 2326 on the telephone by either defendant Laughlin or defendant Forte while he was in the District of Columbia, with Bernice Gross in Baltimore, in furtherance of the conspiracy, would be an overt act committed in the District of Columbia, if you should find such telephone conversation to have been proved beyond a reasonable doubt.

If in this case you find beyond a reasonable doubt that the conspiracy existed and that one or both of the defendants became knowingly and wilfully a member or members of the conspiracy, at the inception of the plan or afterwards, and that one or more of the conspirators knowingly committed, in furtherance of an object or purpose of the conspiracy, one

or more of the overt acts charged in the District of Columbia, then either or both of the defendants who knowingly and wilfully became a member or members of the conspiracy, at the inception of the plan or scheme or afterwards, would be guilty under the first count of the indictment; and this would be true even though the conspiracy was unsuccessful in its purpose.

The indictment alleges that the witness Bernice Gross was an unindicted co-conspirator. Therefore, if you should find beyond a reasonable doubt that she was a co-conspirator, any act or acts of hers done in furtherance of the conspiracy, if you find that she did so act, are  
2327 to be considered by you as the act or acts of a conspirator, even though Bernice Gross is not named as a defendant. Her act or acts in furtherance of the conspiracy, if you find beyond a reasonable doubt that she did so act, are binding on the defendant Forte, or the defendant Laughlin, or both of them, provided you find that Bernice Gross was a member of the conspiracy and that both defendant Forte and defendant Laughlin, or either of them, wilfully became a member of the conspiracy at the inception of the plan or scheme or at some period after the inception of the plan or scheme.

The essence of the conspiracy in this case is the charge that there existed a conspiracy in connection with the case of the United States versus Allan U. Forte, Criminal No. 741-61, in this Court, to prevail upon one Jean Smith, a witness in that case, to endeavor to have the government abandon the prosecution of that case, or to absent herself from the trial of that case, or, if she did testify, to testify falsely.

If you find that Jean Smith was unsuccessful in endeavoring to have the government abandon the prosecution, or if you find that Jean Smith did not absent herself but did testify in Criminal No. 741-61, and did testify truthfully in that case, or, in other words, if you find that the object and purpose of the conspiracy failed entirely, the defendant, or  
2328 defendants, who knowingly and wilfully became a member of members of the conspiracy at the inception of the plan or scheme, or afterward, would still be guilty under Count One of the indictment, provided one or more of the overt acts charged is proved as I have previously instructed you.

Likewise, I instruct you that the question of whether or not Allan U. Forte was in fact guilty or not of the charges made against him in the first two counts of Criminal No. 741-61, or the fact that the defendant Forte was acquitted in Criminal 741-61, has no bearing on whether or not either of the defendants is guilty of the acts charged in this indictment.

Thus, if you should find from the evidence beyond a reasonable doubt that the conspiracy in fact existed and one or more of the overt acts charged under the conspiracy was committed in the District of Columbia, and that either or both of the defendants knowingly and wilfully became a member or members of the conspiracy at the inception of the plan or scheme, or afterwards, such defendant or defendants would be guilty of the conspiracy even though Allan U. Forte was in fact innocent of the charges

made against him in the first two counts of the indictment in Criminal No. 741-61, which charged violation of the abortion statute in the District 2329 of Columbia in connection with an alleged abortion performed on one Jean Smith, and even though defendant Forte was acquitted on the charges in the first two counts of the indictment in Criminal Case 741-61.

Likewise, if you find that Jean T. Smith did not wish to be a witness in Criminal Case 741-61, and that she willingly wrote and sent two letters and willingly sent the Dr. Goldberg letter to the United States Attorney's Office in the District of Columbia, this would be immaterial, provided you find that the government has proved beyond a reasonable doubt that the conspiracy existed and that the defendant Forte or the defendant Laughlin or the unindicted co-conspirator Bernice Gross, or all of them, acting as members of the conspiracy, and as a part of that conspiracy, encouraged, suggested, counseled, ordered or persuaded Jean Smith with respect to the writing or sending of any or all of the three letters.

If the jury should find that the conspiracy charge has not been proved beyond a reasonable doubt, or if the jury should find that none of the overt acts charged has been proved beyond a reasonable doubt, then neither of the defendants would be guilty under Count One of the indictment.

If the jury should find that both the conspiracy and an overt act have been proved beyond a reasonable doubt, but that the government 2330 has failed to prove beyond a reasonable doubt that either one or

both of the defendants did wilfully become a member of the conspiracy at the inception of the plan or scheme or at any time after its inception and before its completion, then the jury would bring in a verdict of not guilty as to Count One as to such defendant or defendants.

You are instructed that if the conspiracy charged in this case existed, said conspiracy necessarily terminated on February 20, 1963, when Criminal Case No. 741-61 terminated.

This Court admitted in evidence certain testimony of Bernice Gross concerning statements made to her by defendant Laughlin during two telephone calls between her and defendant Laughlin on February 27 and February 28, 1963. That testimony covered a period of time after the alleged conspiracy ended. Now I instruct you that that testimony is not admissible and may not be considered by you in any way against defendant Forte, either as to the charges asserted against him in Count One or Count Two of the indictment. You may, however, consider that testimony with respect to the degree of credibility you should give to other testimony of Bernice Gross which was admitted in evidence against the defendant Forte.

With respect to defendant Laughlin, I instruct you that the testimony of Bernice Gross concerning statements made to her by defendant Laughlin during the two telephone conversations between her and the defendant Laughlin on February 27 and February 28, 1963 may be considered by you not only in judging the degree of credibility you should

give to other testimony of Bernice Gross which was admitted in evidence against the defendant Laughlin, but also you may consider that testimony of Bernice Gross as bearing on the question of whether the defendant Laughlin was a part of any conspiracy that may have previously existed as alleged in the indictment, if you should find beyond a reasonable doubt from other evidence adduced in the case that such conspiracy in fact existed. However, I further instruct you that you may not consider the testimony of Bernice Gross concerning the February 27 and February 28, 1963 telephone conversations between her and defendant Laughlin with respect to whether or not the conspiracy did exist, or with respect to the charge asserted against defendant Laughlin in Count Four of the indictment, about which I will now instruct you.

Counts Two and Four of the indictment charge obstruction of justice. Count Two relates to the defendant Forte alone. Count Four relates to the defendant Laughlin alone. Count Two charges:

"1. The first two numbered paragraphs of Count One of this indictment" (which I have already read to you) "are  
2332 by reference incorporated into and made a part of this count.

"2. That the said Allan U. Forte, the defendant indicted in this count, well knew the proceedings preliminary to and the trial of Counts One and Two of United States versus Allan U. Forte, Criminal Case No. 741-61, would and did involve, among other things, a determination

of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things:

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and
- c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

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"3. That from about September 1, 1961 to February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, the defendant Allan U. Forte, well knowing, believing and expecting, and having reason to know well, believe and expect that the said Jean Smith would be a material witness in the proceedings preliminary to and in the trial of Counts

One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, including sub-paragraphs a, b and c thereof, the defendant, Allan U. Forte, did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting and persuading her to induce the government to abandon prosecution and, if prosecution were not abandoned, then to absent herself from the said proceedings and trial, and, if she did not absent herself, then to testify falsely to the aforesaid matters at said proceedings and trial."

THE COURT (continuing): Count Four charges the defendant Laughlin alone in substantially the same language as I have just read to you from Count Two, except that in Count Four it is alleged that the acts occurred between April 15, 1962 and February 20, 1963; whereas against the defendant Forte, in Count Two, it is alleged that the acts occurred between  
2334 September 1, 1961 and February 20, 1963.

As I stated, you will have a copy of the indictment in the jury room with you. Counsel have agreed that the Court need not read Count Four to you.

Now in these two counts of the indictment which I have just referred to, Count Two charges the defendant Forte alone and Count Four charges the defendant Laughlin alone. Each is charged with violating

Section 1503 of Title 18 of the United States Code. This is one of the same sections which Count One charges that the defendants conspired to violate. But it is the violating of Section 1503 itself which is charged against the defendant Forte in Count Two and against the defendant Laughlin in Count Four.

Title 18, Section 1503 of the United States Code prohibits influencing a witness or obstructing the administration of justice, in the following language:

"Whoever corruptly . . . endeavors to influence, intimidate or impede any witness in any court of the United States . . . in the discharge of his duty . . . or corruptly . . . influences, obstructs or impedes, or endeavors to influence, obstruct or impede the due administration of justice, shall be"

punished by the penalty prescribed by the statute.

2335        The following are the elements of the crimes charged in these two counts which must be proved by the government as to each individual defendant, beyond a reasonable doubt:

1. That proceedings were pending in the United States District Court for the District of Columbia in Criminal Case No. 741-61, and that the defendant in each count, as it may be, knew or believed that such proceedings were pending.

A criminal proceeding is pending between the time a complaint is lodged with a committing magistrate charging a violation of the laws of the United States and the time a verdict is reached. In Criminal Case No. 741-61 a complaint was filed in August of 1961 and the case was terminated on February 20, 1963.

2. That Jean Smith was expected to testify as a witness in that case and that the defendant Forte and the defendant Laughlin, as each count applies to each of them, knew or believed that Jean Smith was to testify as a witness in the case.

3. That during the time the case was pending the defendant Forte and the defendant Laughlin, as each count applies to each of them, corruptly endeavored to influence Mrs. Smith.

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To corruptly endeavor to influence a witness means for an improper motive to make any effort to, to strive to, to try to influence a witness in a way which would impede or obstruct justice. To pay a witness in order that the witness would endeavor to have the government abandon prosecution, or in order that the witness would not testify, or in order that the witness would testify falsely, or to convey an intimation to a witness that the witness would be

paid for testifying falsely, would be to corruptly endeavor to influence that witness.

However, the endeavor need not be accompanied by payment or promise of payment of money in order to be corrupt. To make any effort to influence a witness for the purpose of obstructing the due administration of justice --and by "obstructing" is meant hindering, retarding or blocking--is to corruptly endeavor to influence that witness.

Nor is an endeavor necessarily an actual attempt.

Any effort to accomplish the evil purpose that Section 1503 was enacted to prevent would constitute an endeavor within the meaning of the statute.

In order to violate this section of the United States Code, it is not necessary to succeed in influencing a witness or to succeed in obstructing the due administration of justice. Corruptly endeavoring to do so, 2337 whether successful or not, is sufficient to violate the statute.

Therefore, in this case it would make no difference whether in fact Mrs. Smith was influenced by the alleged conduct of the defendants; nor would it make any difference if Mrs. Smith herself did not wish to testify. Even if Mrs. Smith was willing to send the letters in question, and even if she did not wish to testify, still an endeavor to influence her for an improper motive to send the letters in an effort to have the government abandon prosecution or an endeavor to influence her for an improper

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2. That Jean Smith was expected to testify as a witness in that case and that the defendant Forte and the defendant Laughlin, as each count applies to each of them, knew or believed that Jean Smith was to testify as a witness in the case.

3. That during the time the case was pending the defendant Forte and the defendant Laughlin, as each count applies to each of them, corruptly endeavored to influence Mrs. Smith.

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To corruptly endeavor to influence a witness means for an improper motive to make any effort to, to strive to, to try to influence a witness in a way which would impede or obstruct justice. To pay a witness in order that the witness would endeavor to have the government abandon prosecution, or in order that the witness would not testify, or in order that the witness would testify falsely, or to convey an intimation to a witness that the witness would be

paid for testifying falsely, would be to corruptly endeavor to influence that witness.

However, the endeavor need not be accompanied by payment or promise of payment of money in order to be corrupt. To make any effort to influence a witness for the purpose of obstructing the due administration of justice --and by "obstructing" is meant hindering, retarding or blocking--is to corruptly endeavor to influence that witness.

Nor is an endeavor necessarily an actual attempt.

Any effort to accomplish the evil purpose that Section 1503 was enacted to prevent would constitute an endeavor within the meaning of the statute.

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Therefore, in this case it would make no difference whether in fact Mrs. Smith was influenced by the alleged conduct of the defendants; nor would it make any difference if Mrs. Smith herself did not wish to testify. Even if Mrs. Smith was willing to send the letters in question, and even if she did not wish to testify, still an endeavor to influence her for an improper motive to send the letters in an effort to have the government abandon prosecution or an endeavor to influence her for an improper

motive not to testify, or to testify falsely, would be sufficient to violate the statute.

Likewise, it would make no difference under the statute whether the person accused in United States v. Allan U. Forte, Criminal Case No. 741-61, was found guilty or not guilty of the charges against him in those proceedings.

Now with respect to Counts Two and Four of the indictment, if the jury should find beyond a reasonable doubt that, as charged in Count One of the indictment, a conspiracy to corruptly endeavor to influence Mrs. Smith in fact existed, and that defendants Forte and Laughlin were members of the conspiracy, then any act within the scope of the conspiracy by any one of the conspirators in furtherance of the illegal purpose of the  
2338 conspiracy, during the time both defendants were members of the conspiracy, would be chargeable against the other conspirators as a violation of Title 18, United States Code, Section 1503, as alleged in Counts Two and Four.

For example, if the jury should find beyond a reasonable doubt that Bernice Gross and the defendants Forte and Laughlin were all members of the conspiracy to corruptly endeavor to influence Jean Smith and during the period of their membership of the conspiracy Bernice Gross did some act in furtherance of the conspiracy to violate Title 18, United States Code, Section 1503, then this act would be chargeable against both Forte and Laughlin as a violation of Title 18, Section 1503 of the United

States Code, as alleged in Count Two of the indictment against defendant Forte and as alleged in Count Four of the indictment against defendant Laughlin.

Likewise, if the jury should find, beyond a reasonable doubt, that Bernice Gross and the defendants Forte and Laughlin were all members of the conspiracy, an act by the defendant Laughlin in furtherance of the conspiracy would be chargeable to the defendant Forte in Count Two, and an act by Forte in furtherance of the conspiracy, under these circumstances, would be chargeable to the defendant Laughlin in Count Four.

2339 Now, of course, members of the jury, my comments, if any, on the evidence and on the facts are not binding on you; and if my recollection does not accord with your recollection of the testimony, then your recollection must prevail.

I want you to take this matter and consider it deliberately, in the light of the instructions which I have given to you, using the same ordinary common sense and ordinary intelligence which you would employ in determining any other important matter that you have occasion to decide in the course of your everyday life.

With respect to the possible verdicts in this case:

Under Count One, the conspiracy count, so far as the defendant Forte is concerned, the verdict will be either guilty or not guilty; so far as the defendant Laughlin is concerned, your verdict will be either guilty or not guilty.

Count Two, the substantive count against Forte alone, your verdict will be guilty or not guilty.

Count Four, the substantive count against the defendant Laughlin alone, your verdict will be guilty or not guilty.

As you know, your verdict must be by unanimous vote of all the jurors.

When you retire to the jury room you will select from among your number one to serve as your foreman.

2340        In the event there is any reason to communicate with the Court, your foreman will do so by a written message. There will be a marshal outside your door, and he will see that the Court gets it. But I caution you, at all times in any communication be very, very careful and don't disclose how you stand on any vote or how you are on any particular verdict. In other words, you may not let anyone know, except the 12 of you who are deliberating, how you feel at any time about guilt or innocence on any of these counts, until you come in and render a verdict.

THE COURT (continuing). Will counsel come to the bench, please.

(At the bench:)

THE COURT. Is there any object, Mr. Lowther?

MR. LOWTHER: No, sir.

MR. LAUGHLIN: Your Honor, I want to renew the requests for instructions that were denied.

THE COURT. I deny them again.

MR. GARBER. I join in that, Your Honor.

THE COURT: I deny yours again.

MR. GARBER. Your Honor, during the course of the instructions Your Honor was reading from the indictment and, as I recall, Your Honor read paragraph 6 on page 2.

THE COURT. Yes.

2341 MR. GARBER. That referred to Birge.

THE COURT. Yes.

MR. GARBER. And that material was stricken out.

THE COURT. It was not out of the copy I received, was it?

MR. GARBER. Well, actually this referred to Count 3, which was dismissed.

THE COURT. Do you want me to clarify it?

MR. GARBER. I feel at this point that to call the jury's attention further to it would compound the effect that the reading of this might have. Therefore, on the basis of the Court's reading paragraph 6 of Count 1 of this indictment, referring to Birge and not referring to Smith, I would move for a mistrial.

THE COURT. You don't want me to make any explanation ?

MR. GARBER. Your Honor, I feel if you made an explanation, it would only compound what has already been done.

THE COURT. So therefore I understand you do not want me to make an explanation?

MR. GARBER. I would not ask for an explanation.

THE COURT. Mr. Laughlin, do you join in that?

MR. LAUGHLIN. I join in that point, and I agree with that.

2342 It would be prejudicial as far as both defendants are concerned.

THE COURT. Mr. Lowther?

MR. LOWTHER. There is no grounds for a mistrial here, sir.

THE COURT. I deny the motion for mistrial.

As I understand, both counsel do not want any explanation made of the paragraph 6, and I will not make any.

You don't want any explanation made either, of paragraph 6, Mr. Lowther?

MR. LOWTHER. No, sir.

THE COURT. Is there anything else?

MR. GARBER. Your Honor, when the Court instructed as to the criminal record of Dr. Forte, there has been testimony by Forte explaining the conviction.

THE COURT. Yes, sir.

MR. GARBER. And there was also testimony he had received a pardon.

THE COURT. Yes, sir.

MR. GARBER. I think the jury should be instructed that in connection with Forte's criminal record "you are further instructed that in evaluating Forte's criminal record as affecting Forte's credibility, you may also consider the explanation given by Forte on the witness stand attenuating such conviction, including the testimony that Dr. Forte has  
2343 received a pardon from the Governor"--

THE COURT. What are you reading from?

MR. GARBER. This is something I wrote out, Your Honor.

MR. LOWTHER. I will object.

THE COURT. I think that was a matter for argument. You didn't see fit to argue it. I am not going to instruct on it.

MR. GARBER. I would also ask the Court to instruct the jury on Forte's theory of defense.

THE COURT. What is his theory of defense?

MR. GARBER. Well, his theory of defense was this, as he testified.

THE COURT. I asked if you wanted entrapment, and you said you didn't.

MR. GARBER. No, that is not our theory, not entrapment, Your Honor. But that the jury be instructed, as Forte testified, his relation with Gross was instigated by Gross, and the purpose of their meeting and telephone conversations was for Gross to supply Forte with information concerning one Samuel Wallace.

THE COURT. In other words, you want me to argue your case for you this morning; is that right? You argued that yesterday.

2344 MR. GARBER. But I think the defendant is entitled to an instruction on his theory of the case.

THE COURT. I deny your request.

MR. GARBER. Your Honor, I have written these out in long-hand and I would ask that they be made a part of the record (handing).

THE COURT. We had better put a number on them. You want to just carry these on with the next number?

MR. GARBER. Yes, Your Honor. I think it would be 35.

THE COURT. Do you have any particular order for them?

MR. GARBER. I read the criminal record one first, which should probably be 35, and the other one 36.

THE COURT. I deny them both.

MR. GARBER. And may the record show that the defendant Forte objects to the denial of 35 and 36?

THE COURT. Yes, sir. Today is the 29th.

MR. GARBER. As well as the denial of all of the other instructions?

And the record will also show that the defendant Forte objects to the denial of his motion for mistrial.

MR. LAUGHLIN. Your Honor, let the record show I am joining in this, also.

2345 THE COURT. Surely.

I tell you what I am going to do. I can't find the copy of the indictment that I was having prepared to send in. It must be in my chambers. So I will tell the jury the indictment will be turned over to them by the Marshal. And I am also going to tell them they may call for any exhibits they desire that have been received in evidence.

MR. LAUGHLIN. Your Honor understands the request I made; it is a renewal of the motions made and denied during the trial, as well as denial of the instructions. I think you covered it yesterday.

THE COURT. I reiterate all the rulings I made yesterday.

MR. LAUGHLIN. Yes.

MR. GARBER. And I join in that motion, so that the record will be perfectly preserved.

THE COURT. Is there anything further?

MR. LAUGHLIN. I have nothing further.

MR. GARBER. Other than those objections

(In open court:)

THE COURT. Ladies and gentlemen of the jury, I will have made available to you, through the Marshal, a copy of the indictment, which will be furnished you; and you may at any time request any or in  
2346 fact all of the exhibits which have been received in evidence. Those received in evidence will be furnished to you at your request. The Marshal will be right outside the door and you can let him know; your foreman can communicate in that way with him.

Now, Mr. Singleton, Mrs. Owens and Mrs. Ormsby, do you have any personal effects in the jury room? You are the alternates. (There was an affirmative response.) Would you please step in and bring them out, and then come back in here, please.

(The alternate jurors having returned to the courtroom:)

THE COURT. Now the regular 12 jurors may accompany the Marshal to the jury room. The three alternates will stay here, please.

(Accordingly at 11:21 a.m. the jury retired to consider of its verdict.)

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#### REPORTER'S CERTIFICATE

This record is certified by the undersigned reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

/s/ Thomas O'Neal

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Excerpts of Transcript - Criminal No. 600-61Dorothy Birge - Direct Examination

33 DOROTHY L. BIRGE,

Being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOWTHER:

Q Your name, madam, is Dorothy, middle initial L, Birge--  
B-i-r-g-e; is that right?

A Yes, sir.

Q Mrs. Birge, do you recognize the defendant Forte in court  
today, who is seated behind me at counsel table?

A Yes, sir, I do.

Q And would you point him out for the benefit of the Court and  
these ladies and gentlemen of the jury, if you please.

A Yes, sir; he is sitting right there.

MR. LOWTHER. May the--

THE COURT. In what position at that table? There are three  
people there.

THE WITNESS. He is sitting to my extreme left at the table.

THE COURT. Very well. The record will show that Mrs.  
Birge has pointed out the defendant Forte.

BY MR. LOWTHER:

Q Now I want to direct your attention to the late part of August  
or the early part of September of the year 1961, and ask you this question:

Dorothy Birge - Direct Examination

Would you tell His Honor and these ladies and gentlemen whether or not  
34 you received a telephone call from the defendant Forte at or about  
that time?

MR. GARBES. Your Honor, I think the prosecutor should  
refrain from leading questions.

THE COURT. Did you receive a telephone call from the de-  
fendant Forte in September or August of 1961?

THE WITNESS. Yes, sir, I did.

BY MR. LOWTHER:

Q Now would you tell the Court and jury, prior to the time that  
you received that telephone call--and answer this yes or no, if you will,  
please, Mrs. Birge--had you had occasion to see Forte, before the call,  
had you had occasion to see him in person--yes or no?

A Yes.

Q And, yes or no, prior to the time that you received that tele-  
phone call, in late August or early September, 1961, from Forte--yes  
or no again, if you please--had you had occasion to speak with him on  
the telephone?

A Yes.

Q All right. Now, where were you when you received this call  
from the defendant Forte in 1961, in late August or September?

A At my home.

Dorothy Birge - Direct Examination

Q And where was that, please?

A Commonwealth Avenue, in Alexandria.

35 Q And would you tell--and answer this yes or no--did any part of that telephone call relate to a person named Jean Smith?

A Yes, sir, it did.

Q And did you know, before you received this phone call, did you know or were you acquainted with Jean Smith?

A Yes, sir.

Q And is the Jean Smith of whom you speak and of whom I ask you now, is that the lady who--

MR. LOWTHER. Your Honor, this lady wasn't here for the voir dire. So, if Your Honor please, may Mrs. Smith be brought in the courtroom, please?

THE COURT. Bring Mrs. Smith into the courtroom. Mr. Marshal, would you bring in Mrs. Jean Smith from the witness room.

(A woman entered the courtroom.)

THE COURT. Will you step forward, Mrs. Smith, please.  
(The woman came forward.)

MR. LOWTHER. Thank you.

THE COURT. Do you want anything further of her?

MR. LOWTHER. No, Your Honor.

THE COURT. Very well. (Mrs. Smith left the courtroom.)

Dorothy Birge - Direct Examination

BY MR. LOWTHER:

36 Q Now with regard to the lady who just came into the courtroom, do you recognize that lady?

A Yes, sir.

Q And who is that?

A That is Mrs. Jean Smith.

Q And limiting your answer only to anything, if such was said by the defendant Forte in this telephone call to you, limiting yourself to anything that was said about Jean Smith, did the defendant Forte have anything to say to you, Mrs. Birge, about Jean T. Smith?

A Yes, sir, he did.

Q And would you tell His Honor and these ladies and gentlemen of the jury what the defendant Forte said to you in regard to Mrs. Smith?

A He asked me if I would contact her and tell her he would return her money, and if she would forget everything, and just not remember anything when she got on the stand.

THE COURT. I am sorry, I didn't hear you, Mrs. Birge, the last part, please.

THE WITNESS. He asked me if I would get in contact with her and tell her that he would return her money, and to forget everything when she got on the stand.

Dorothy Birge - Direct Examination

BY MR. LOWTHER:

37 Q And in relation to the date of this telephone call that you received from Dr. Forte, did he identify himself by name?

A Yes, he did.

Q And can you tell the Court and these ladies and gentlemen of the jury, did you recognize his voice, in addition to him identifying himself?

A Yes, sir, I did.

Q Now, in regard to the date of this phone call, where were you working at the time? What was your place of employment, ma'am?

A I was working at the Pentagon Building

Q And in regard to the date of the phone call, I am showing you now--

MR. LOWTHER. And may this be marked, if Your Honor pleases. Government's Exhibit 1 for identification?

THE COURT. It may be so marked.

(A 1961 calendar was marked for identification as Government's Exhibit No. 1.)

MR. LOWTHER. I will show it to counsel, if Your Honor pleases.

THE COURT. Surely.

(The last-marked exhibit was handed to defense counsel and returned by them.)

Dorothy Birge - Direct Examination

BY MR. LOWTHER:

38 Q Showing you now that part of Government's Exhibit numbered 1, Mrs. Birge, which consists of a calendar for the year 1961, and directing your attention to the date of September 4, right here, which is the first Monday in September of that year, Labor Day, can you tell His Honor and these ladies and gentlemen of the jury, with that calendar before you, as you best remember it, when was it that you received this phone call from the defendant Forte that you have just related?

A September the 1st.

Q And what day of the week would that be?

A Friday.

MR. LOWTHER. That completes my direct examination of the witness, if Your Honor pleases.

THE COURT. Very well.

MR. LAUGHLIN. Your Honor, may we come to the bench?

THE COURT. You may come to the bench.

(At the bench:)

MR. LAUGHLIN. Your Honor, would Your Honor tell the jury that her testimony, her statements, are not admissible against me?

THE COURT. Are you going to tie this up? This was before the --

Dorothy Birge - Direct Examination

MR. LOWTHER. This was before the date alleged in the indictment. It was before the appearance of the defendant Laughlin as counsel, and this is not offered and is not evidence as to him.

THE COURT. Very well. I shall so instruct the jury.

(In open court:)

THE COURT. Ladies and gentlemen of the jury, the testimony you have just heard from Mrs. Birge does not go to defendant Laughlin; in other words, it does not apply to him. So what you have heard here has no relationship to any charges made against him in this case. And you will bear that in mind, please, throughout the case.

Is that satisfactory to you, sir?

MR. LAUGHLIN. Yes, it is satisfactory, Your Honor.

THE COURT. Mr. Lowther, is it satisfactory to you?

MR. LOWTHER. It is indeed, Your Honor.

THE COURT. Very well. You may proceed now to cross-examine, Mr. Garber.

\* \* \*

Jean Smith - Direct Examination

45

JEAN T. SMITH,

being first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

BY MR. LOWTHER:

Q Mrs. Smith, your name is Jean--J-e-a-n--T. Smith; is that right?

A That's right.

Q And, Mrs. Smith, where do you now live?

A 615 Southmont Road, Catonsville, Maryland.

Q And that road is spelled S-o-u-t-h-m-o-n-t?

A That's right.

Q And that's in Catonsville, Maryland?

A That's right.

46 Q And is Catonsville a suburb of Baltimore city?

A That's right.

Q Were you living there in the year 1962?

A Yes.

Q Now, first of all, would you tell the Court and these ladies and gentlemen, Mrs. Smith, do you know the lady who testified just before you took the stand--Mrs. Birge?

A Yes.

Q Now let me ask you this question, if I may: Do you recognize in court today the defendant Forte?

Jean Smith - Direct Examination

A Yes.

Q And would you point him out to the Court and jury, please.

A He is the man sitting at the end of the table over there, in the light suit.

Q Very well.

THE COURT. The record will show that the witness has identified the defendant Forte.

BY MR. LOWTHER:

Q Now, I want to ask you this: Did there come a time, in the month of July, 1961, or early August, 1961--and answer it yes or no, if you will--when you had occasion to be interviewed by a lady known to you or identified to you as Mrs. Bernice Gross?

47 A Yes.

Q And when was it, July or August, Mrs. Smith?

A It was in July, the end of July.

Q And at that time, when Mrs. Gross interviewed you, was she alone or was there another lady with her?

A There was another woman with her.

Q And do you recall the name of the other lady?

A Lorraine Burnell--but I'm not sure of the last name.

Q And at the time Mrs. Gross interviewed you in July of 1961, did she identify herself as a policewoman of the Baltimore Police Department?

Jean Smith - Direct Examination

A Yes.

Q Now I want to direct your attention, if I may, to the period of time--

MR. LOWTHER. And before I do that, may I see, if Your Honor pleases, the file in 741-61? (The file was handed to counsel.) Thank you.

BY MR. LOWTHER:

Q Mrs. Smith, would you tell His Honor and the ladies and gentlemen of the jury whether or not you are the same Jean T. Smith--

MR. LOWTHER. And if you will indulge me a moment, please, Your Honor?

THE COURT. Surely.

48 BY MR. LOWTHER:

Q I am showing you now part of the court file in Criminal No. 741-61, Mrs. Smith, and the first two counts of the indictment in that case. Having these before you on the stand, would you tell His Honor and the ladies and gentlemen of the jury, are you the same person as the person named in the first two counts of this indictment, "Jean Smith"?

A Yes.

MR. LOWTHER. With Your Honor's leave at this time, before I proceed with the witness, I would like to read counts 1 and 2 to this jury.

Jean Smith - Direct Examination

MR. GARBER. Your Honor, may we approach the bench?

THE COURT. Come to the bench.

(At the bench:)

MR. GARBER. Your Honor, I am going to object, on behalf of the defendant Forte, to any reading of the counts of the indictment to the jury.

THE COURT. Are you willing to stipulate what the counts, in substance, are?

MR. GARBER. The facts of that case are not relevant here.

THE COURT. They certainly are relevant. That is exactly the charges made in this indictment, that your defendant Forte and the  
49 defendant Laughlin attempted to obstruct justice in that very case. Isn't that the essence of what we are faced with here?

MR. GARBER. That is the charge. But he is going into the facts of that case.

MR. LOWTHER. I don't intend to do that, Your Honor.

THE COURT. Will you stipulate that counts 1 and 2 of 741-61--  
Are they two abortion counts?

MR. LOWTHER. One is the abortion, one the attempt.

MR. GARBER. I will stipulate that that is what the charge is in that case.

THE COURT. That's what the indictment is.

Jean Smith - Direct Examination

MR. GARBER. But I don't think it should be read to the jury.

THE COURT. You can read it. And immediately I will instruct the jury that an indictment is nothing more than a notice. You can read it.

(In open court:)

MR. LOWTHER. With Your Honor's leave, reading now, members of the jury, from the first count in 741-61, and it reads as follows:

Allan U. Forte, herewith charged, July 20, 1961, with procuring and producing abortion, miscarriage, of Jean Smith, she being then and there pregnant.

50           ¶Count 2: You are herewith charged, July 20, 1961, with attempting to produce and procure an abortion and miscarriage of Jean Smith.

THE COURT. Now, ladies and gentlemen of the jury, you are instructed that an indictment, in any case, is the method whereby the defendant is brought to trial and by which he is informed of the charges made against him. It is not evidence in any case in which it is filed.

Proceed.

BY MR. LOWTHER:

Q     Now, Mrs. Smith, in the month of, or in the springtime, I should say, directing your attention to the springtime of the year 1962, can you tell the Court and these ladies and gentlemen of the jury whether

Jean Smith - Direct Examination

or not you had occasion to receive a telephone call from Bernice Gross?

A Yes.

Q And as best you recall it, what was the, at least the month, that that phone call was received by you?

A In February or March.

Q And did Mrs. Gross-how did you know it was Mrs. Gross?

A I recognized her voice.

Q And that is the same Mrs. Gross who was identified at the beginning of the case, --

A Yes.

51 Q --before these ladies and gentlemen?

A Yes.

Q Now will you relate to the Court and these ladies and gentlemen of the jury what, if anything, Mrs. Gross told you on that occasion over the phone?

MR. GARBER. Your Honor, I am going to object to that conversation between her and Mrs. Gross.

THE COURT. Excuse me?

MR. GARBER. I would object to any conversation between this witness and Mrs. Gross.

THE COURT. Come to the bench.

Jean Smith - Direct Examination

(At the bench:)

THE COURT. I assume, then, that what you are objecting to is that there has been no conspiracy as yet shown.

MR. GARBER. That is correct.

THE COURT. The Court has the discretion to receive in evidence such statement, subject to the government's stating that it can tie it up and show a conspiracy. Is that what you purpose to do?

MR. LOWTHER. I do, Your Honor.

THE COURT. I am receiving it, subject to the Government's tying it up and showing that there did exist a conspiracy, to which Gross was a party, a co-conspirator, and Forte was a co-conspirator at the time, as I understand it.

52           When did Mr. Laughlin come into this?

MR. LOWTHER. April, 1962.

THE COURT. At this time it could not have Mr. Laughlin involved, even if a conspiracy is shown. But if there was a conspiracy, subsequently shown, that is, between Gross and Forte, then certainly any statement she made with respect to it, it ties on to Gross, too.

And I will instruct the jury, Mr. Laughlin, as soon as this comes out, it does not go to you at that date. It is not alleged you came into the conspiracy until April of 1962.

Does everybody agree?

Jean Smith - Direct Examination

MR. LOWTHER. Yes, Your Honor.

MR. LAUGHLIN. I think that is correct. What does the file show?

THE COURT. April 20, 1962. We will remember that date. April 20, 1962 is when you entered your appearance in the case; is that right?

MR. LAUGHLIN. If the file shows that. I don't remember the specific date. But if the file shows it.

THE COURT. Let's get the file--741-61--please. April 20, 1962.

MR. LAUGHLIN. Very well.

THE COURT. I will so instruct the jury that any testimony  
53 at this time, February and March, does not go to you, Mr. Laughlin.

MR. LAUGHLIN. Yes, sir.

THE COURT. Very well.

(In open court:)

THE COURT. Mr. O'Neal, would you repeat the question,  
please.

THE REPORTER (reading):

"Now will you relate to the Court and these ladies and gentlemen of the jury what, if anything, Mrs. Gross told you on that occasion over the phone?"

Jean Smith - Direct Examination

THE COURT. This, remember now, is in March or February of 1962. Very well.

THE WITNESS. She told me she was no longer on the police department.

MR. LAUGHLIN. Your Honor, I didn't get it.

THE COURT. I didn't, either.

THE WITNESS. She was no longer associated with the police department. And, oh, we talked a little bit about--I think she asked me about the case over here, had anything happened over here with the case.

THE COURT. I am going to ask you to push that mike piece down just a little bit. I think it will be easier on you and we can all hear you better. Yes. (The microphone before the witness was adjusted.)

54 Now, she asked you what about the case over here?

THE WITNESS. Yes.

THE COURT. You mean in the District of Columbia?

THE WITNESS. Yes.

THE COURT. Very well.

THE WITNESS. That's about all. I mean, we talked about that, receiving subpoenas, and not wanting to come, and wondering when it was going to come to trial. That's about it.

Jean Smith - Direct Examination

BY MR. LOWTHER:

Q Can you tell the Court and these ladies and gentlemen of the jury whether or not Mrs. Gross, in this conversation with you, which you placed the date of as best you can, made any suggestions to you as to your conduct, if the trial in fact were to come off, as to what you would do?

A I don't think she did then.

Q Then?

A Yes.

Q Very well.

Now I want to ask you this.

THE COURT. Are you getting away from that? Are you leaving that call?

MR. LOWTHER. I am, Your Honor.

THE COURT. Ladies and gentlemen of the jury, for whatever  
55 evidential value this last bit of testimony has, it does not in any way go to the case that is asserted against Mr. Laughlin. You will recall that Mr. Laughlin is charged to have come into a conspiracy on April 20, 1962. This call was made in February or March, 1962.

Proceed.

\* \* \*

Jean T. Smith - Cross Examination

88 BY MR. LAUGHLIN:

Q Mrs. Smith, before the trial in February of '63, had you ever seen me?

A Before--no.

Q Had I ever talked with you?

A No.

Q Had I ever talked with your husband, to your knowledge?

A No.

Q Had you ever called me?

A No.

Q Had I ever given you any money?

A No.

Q Had I ever made any suggestions to you as to what you would do during the trial?

89 A No.

Q Did I ever, at any time, ask you to falsify anything in connection with the trial?

A No.

Q Did I ever ask you to withhold anything during the trial?

A No.

Q As a matter of fact, in the trial you testified fully, didn't you?

A Yes, I did.

\* \* \*

Jean T. Smith - Cross Examination

96 Q Now, do you know, Mrs. Smith, what the word "rekindle--  
r-e-k-i-n-d-l-e" means?

A Yes.

Q What does it mean?

A To bring something back.

Q In other words, you knew of that word and you, perhaps, had  
used it in the past, hadn't you?

A No.

Q Well, anyway--but you knew what it was?

A Yes.

Q And it was not a new word in your vocabulary, was it?

A I don't think I have ever used the word.

Q But it was not a new word and you knew what it meant?

A Yes.

Q All right. Now, the word "humiliation," what do you under-  
stand that to mean?

A Embarrassment.

Q You have used that?

A Oh, yes.

Q In times past?

A Yes.

\* \* \*

Jean T. Smith - Cross Examination

122 Q Mrs. Smith, before any of these letters were written--and when  
I say these letters, the letters that you have already referred to and which  
123 have been shown you--before any of those letters were written,  
did you ever state to anyone that you wanted the case dropped?

A Not that I wanted it dropped, that I wish it would be dropped  
or stopped or--

Q Yes, ma'am. Now, to whom did you say that?

A Oh, Dorothy Lee, Mrs. Gross, when she came to see me in  
the hospital, and the policemen came to see me at our house, I said that  
to them.

Q Did you ever say that to Officer Wallace?

A Yes.

Q In the presence of Mrs. Gross?

A Yes.

Q And did you make that statement on more than one occasion?

A Oh, yes, yes.

Q And did you make it to Officer Wallace on more than one occasion?

A I probably did.

Q Did you make it to Mrs. Gross on more than one occasion?

A Yes.

\* \* \*

Jean T. Smith - Cross Examination

130 Q Now, see if this refreshes your recollection: Was there a time in early March of 1963 that Mr. Sullivan told you to take Mrs. Gross to the snack bar or the restaurant downstairs and to engage her in conversation, and that you were to record that conversation?

A No, it wasn't said to me that way.

Q Were you given a recorder?

A Yes, I had a recorder.

Q By whom?

A Mr. Wallace gave it to me.

Q Who?

A Mr. Wallace.

Q Now, that's Samuel--

131 THE COURT: Just a moment; Mister who?

THE WITNESS: Wallace.

THE COURT: Oh.

BY MR. LAUGHLIN:

Q That's Samuel E. Wallace?

A That's right.

Q What were you to do with that recorder, Mrs. Davis--excuse me--

A Smith.

Q --Mrs. Smith?

Jean T. Smith - Cross Examination

A If Bernice talked to me at all, I--started talking to me at all, I was to turn it on.

MR. LAUGHLIN: Your Honor, could I have the answer repeated, please?

THE COURT: Surely.

THE WITNESS: If Bernice started to talk to me at all I was to turn the recorder on.

BY MR. LAUGHLIN:

Q Was there any reason why he asked you to do that?

A Yes, they wanted to see what she'd say to me.

Q And did you follow his instructions?

A No.

Q Did you do anything with the recorder?

132 A No.

Q It was quite a heavy thing, wasn't it?

A Yes.

Q And what did you do, put it--did you have on a big coat or in a pocketbook?

A It was in my pocketbook.

Q A big pocketbook like ladies carry, like a small size suitcase over their arms?

A About like that. (Indicating approximately 18 inches.)

\* \* \*

Jean Smith - Cross Examination

134 (At the bench:)

THE COURT. Where did this Grand Jury transcript come from? Were they ordered earlier at the early trial? Were you furnished a transcript?

MR. LAUGHLIN. Yes, Your Honor. Excuse me, I keep talking too loud, Your Honor. I will try to heed your admonition.

I might say, these proceedings, Your Honor, have been a matter, in a number of trials, the courtroom of Judge Youngdahl, courtroom of Judge Hart, and then, let me see, I am not too sure--they were a matter, I think, also of record not in the trial itself but in the motion for a new trial in the case of Joyce Johnson.

In addition, Your Honor, they were made available in complete form when the Government noted an appeal from Judge Curran's ruling dismissing the indictment of 599-63. They were made available and then, also, I should say this to Your Honor: They were made available very completely and minutely in United States Court of Appeals in my own case, the case that was cited then. Based on the motion that I am filing tomorrow--  
135 row--assuming you recess in time, or as soon as I get a chance to file it, to supplement the record in the Supreme Court in the Joyce Johnson--and I am asking for all of this again to be sent there so it's been made available and I will turn up to you, Your Honor, the copy that I am reading from. I am sure that counsel Lowther has--

Jean Smith - Cross Examination

MR. LOWTHER. I have a copy for Your Honor.

THE COURT. May I have that.

MR. LOWTHER. Yes, indeed. I will bring it right up.

\* \* \*

150-B MR. LOWTHER. At this time, before the Court leaves the bench, I want to know if it is appropriate, if Your Honor please, since I am sure that during the examination of Mrs. Gross there will be reference made to her Grand Jury testimony, and since Your Honor has never had anything to do with this case before--

THE COURT. I didn't know there was any Grand Jury testimony.

MR. LOWTHER. I would like to pass up to the Court, if I may, one volume of Mrs. Gross' testimony of March 1, 1963, the first time that she testified. I would like to also pass up to the Court a volume of Mrs. Gross' testimony on March 1, 1963, in the office of Mr.--Assistant United States Attorney Joseph Hannon, also on March 1, 1963.

I would like to pass up for the Court's perusal such time as it becomes appropriate, a second appearance of Mrs. Gross before the Grand Jury on the self same date, which occurred after the conference in Mr. Hannon's office, and I want to get Your Honor a typewritten copy rather  
150-C than a photostat.

Yes, and lastly, if the Court please, I would like to pass up to Your Honor an appearance by Mrs. Gross before the Grand Jury on

Jean Smith - Cross Examination

March the 18th, 1963, and I would also like to advise Your Honor that I am not able to supply the Court--I will try to do so as soon as I can--with another appearance of Mrs. Gross before the Grand Jury in the year 1964. Judge Curran has that at the present time. He has a motion under advisement in regard to a second perjury indictment against the defendant Laughlin, as to dismissal of it. I will get it as soon as I can.

THE COURT. How long has he had that, do you have any idea?

MR. LAUGHLIN. Two weeks ago tomorrow, Your Honor.

MR. LOWTHER. Two weeks, Your Honor.

THE COURT. I will ask him if he is needing it immediately. I will try to get that.

MR. LOWTHER. Very well, sir.

THE COURT. What day is that?

MR. LOWTHER. It's the only one in '64, Your Honor.

THE COURT. Very well.

I assume, Mr. Laughlin, and Mr. Garber, that you gentlemen have copies of this?

MR. LAUGHLIN. Yes, we have, Your Honor.

THE COURT. All this Grand Jury testimony and also the Hannon--in Mr. Hannon's office, the meeting? MR. LAUGHLIN. Yes.

THE COURT. Because it was all new to me.

MR. LAUGHLIN. Yes, then do I understand, Your Honor, then, from the statement made by counsel that represents all appearances of Gross before the Grand Jury?

MR. LOWTHER. It does so.

MR. LAUGHLIN. Very well.

\* \* \*

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215 THE COURT. Let's separate the two of them for a minute.  
And now I want to ask Mr. Lowther something.

Mr. Lowther, with respect to the post February 20, 1963 matter, that is, now I am speaking about the telephone calls apparently put through from this building to Mr. Laughlin by Mrs. Gross which were recorded--which we know from the Court of Appeals opinion--you are not proposing to put that testimony in, are you?

MR. LOWTHER. I am not proposing to put the tapes on, sir.

THE COURT. I am bothered about that; and before you get to that, I am going to have to ask you to give me some authority.

216 Now I read a very lengthy case cited to me by Mr. Laughlin--Denna, or something like that.

MR. LAUGHLIN. I have it right here, Your Honor.

THE COURT. And I have it up here. And the problem there, if you will recall, the question was raised whether or not the illegal wire tap gave the government certain evidence that they utilized. The case was tried twice, the second time before Judge McMahon of the Southern District, and the first time before Judge Levin. When Judge Levin had the case before him the first time, he had a voir dire examination of that wire tap, and the evidence that they were proposing to put in evidence. And Judge Levin held, according to the Second Circuit, that there was no evidence acquired through the illegal wire tap. Now the inference,

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of course, is that if some evidence had been acquired, it would not be admissible. Don't we have somewhat of a similar problem here, sir?

MR. LOWTHER. We have it only in relation to the calls made after the grand jury.

THE COURT. That is what I am limiting my question to.

MR. LOWTHER. And I fully agree with Your Honor that there is some problem there. As far as the tapes themselves are concerned, the playing of them is no problem; they are out.

217 THE COURT. That's out, and there's no question about that.

MR. LOWTHER. I would like at this time to ask Your Honor to reserve judgment, if you will, sir.

THE COURT. I am going to. But I am also going to instruct you, sir, not to go to that, in the direct examination of this witness, until we do get some ruling.

MR. LOWTHER. I would not think of doing that, Your Honor.

THE COURT. Now let's go to the other point.

Now, Mr. Laughlin, as I understand your problem concerning the testimony that Bernice Gross gave and, I assume will give, again, about activities from September 1961 and through February 20, 1963-- and I can only tell from the overt acts alleged in the indictment--I assume she would testify and did testify, that she got, for instance, in Baltimore with you and Mr. Forte, and that she did certain things, and that she

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received certain money from Mr. Forte, and that she did some of these things, at least, in the overt acts.

Now your position, as I understand it, was first on Friday that since it was involuntary, therefore it could not be elicited from her in the courtroom. I think that both you and I pretty much agreed that the case you were citing was not really applicable, because it was where the defendant himself.

MR. LAUGHLIN. Yes.

218 THE COURT. So then we come to the next question, whether or not the testimony she will give--and let's assume it was coerced from her at the time by the United States Attorney's Office. We will assume that for the moment. Yet if she comes in here and is willing to take the witness stand and testify to the very same facts, doesn't it go to the weight the jury should give, rather than to admissibility?

MR. LAUGHLIN. Well, it possibly would, Your Honor, except--and before I answer that, if I may make this observation.

THE COURT. Yes.

MR. LAUGHLIN. I would agree, Your Honor, under that old case I cited, that was the defendant. But I don't think there is too much difference in this case, for this reason: She is a conspirator, but not a defendant. Therefore under the law of agency would she not, for the purpose of this argument, be my agent? Therefore, being my agent,

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and coming here to testify, I say that the same rule applies and she is virtually a defendant.

Now I think your situation would be different, Your Honor, if they had not misled her. You may recall--and unquestionably there is so much to read, I would hardly expect Your Honor would know everything that took place in that grand jury. Mr. Garber and I have gone over 219 it time and time again. But they told her, in the grand jury room, that if there was an immunity statute, they would give her immunity, but there was no immunity statute. But in truth and in fact, Your Honor, there is an immunity statute in this district. I can't think of the exact citation. But if there is any question whether it is really an immunity statute, it is Carrado versus United States, I think decided in 1963, and I think the opinion was written by Judge Miller. He said definitely this is an immunity statute.

It was rather clumsily drawn, the statute. It says that before a defendant goes into his defense, or her defense, the government can grant immunity. That was this long conspiracy case of Catfish Turner and others, and Judge Miller came out and said it is an immunity statute.

THE COURT. When did that opinion come down?

MR. LAUGHLIN. That opinion, Your Honor, I think was 1963. I have so much to carry, Your Honor, and I had intended to bring it; but I just didn't have the room. It's 19--

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THE COURT. The point I am getting at, sir, is this: apparently it was the first pronouncement of the Court of Appeals that that statute was an immunity statute. Is that your understanding of it?

MR. LAUGHLIN. Yes. If there was an earlier one, I was unaware of it. But I am quite sure it was the first pronouncement, Your  
220 Honor, in 1963. And unquestionably that was known to the United States Attorney's Office--1953.

THE COURT. Oh, 1953?

MR. LAUGHLIN. 1953.

THE COURT. I thought you said 1963.

MR. LAUGHLIN. Oh, if I said that, Your Honor, I am in error. I want to correct myself. Because the Catfish Turner case was tried--it may have been 1954, Your Honor--it was tried in either late 1952 or early 1953. And it's Corrado. I had that volume and intended to bring it with me.

So let me say this. Therefore, had that been done, then when the trial got under way they could have granted her immunity and they could have told her at that time. Nevertheless, notwithstanding that, they kept her hanging high in the air. And for all intents and purposes, she still can be indicted.

Also, in that interrogation in Mr. Hannon's office, she was told, "You will either be a witness or you will be a defendant. The choice is up to you--a witness or a defendant."

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Now in this courthouse, in the last two or three weeks, Judge Holtzoff made some comment about using a grand jury proceeding to obtain testimony. I don't know the full details of that case. I do remember reading something in the paper.

221 In view of that, Your Honor, I don't see how her testimony could even be received, under the authority of this case, could be received for any purpose.

Now I well realize Your Honor is making a distinction of things that took place before March 1st--

THE COURT. Or after February 20.

MR. LAUGHLIN. Yes, to put it that way, after February 20, because it is conceded that the conspiracy ended that day.

Now her testimony conceivably, Your Honor, might be received maybe as to the substantive offenses. I know of no theory that it could be received on the conspiracy count. But I contend, Your Honor, under all of the authorities, that her testimony should first be received out of the presence of the jury.

THE COURT. You are not saying and are not contending, are you, Mr. Laughlin, that a co-conspirator, unindicted, could not testify in open court concerning the acts of the conspirators, and even the statements of the conspirators? In other words, you are not saying that that is the--and I forget the name of it--Leftwich case? You are not saying that?

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MR. LAUGHLIN. No, Your Honor. In other words, there  
222 would be a distinction between what you might call a "live" witness,  
a person giving live testimony, like in a TV show.

THE COURT. Well, in Gordon versus United States, it is  
settled, in any event, in the Sixth Circuit.

MR. LAUGHLIN. Yes.

THE COURT. With certiorari denied, and which followed  
within the year the Fishwick case, --

MR. LAUGHLIN. Yes.

THE COURT. --where it was held that a confession could  
not be used.

MR. LAUGHLIN. Yes.

THE COURT. So you don't need to worry about that. What  
you are really coming down to, then, is was this evidence that she would  
give coerced out of this witness by the United States Attorney.

MR. LAUGHLIN. Yes; that's right.

THE COURT. I am going to hold, sir, that that goes to the  
weight and the credibility. And it will be heard in front of the jury, and  
you can argue on it. You can argue the weight.

Mr. Garber wants to say something.

MR. GARBER. Yes. I would like to make one observation,  
if I may, Your Honor, in connection with this. Part of the evidence which

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223 supported this present indictment and which was presented at the previous trial concerned certain taperecorded telephone conversations, allegedly between this witness Gross and allegedly between the defendant, Mr. Laughlin. And in those tape recordings certain facts were alluded to, certain names were alluded to--I believe the name Smith was mentioned at one time--and the inference was that this evidence supported the government's theory as to the conspiracy case.

Now the Court of Appeals--

THE COURT. Well wait a minute. Judge Hart instructed very specifically, and the Court of Appeals recognized, did it not, that whatever came off of that tape could only go to Mr. Laughlin and could not go against his alleged co-conspirator.

MR. GARBER. Well, that's true, Your Honor. But I'm carrying it one step further. When the Court of Appeals reversed this prior judgment and ruled that these tape recordings were inadmissible, I take the position that anything contained in those tape recordings is inadmissible.

THE COURT. Don't worry about that now. Reserve your argument. Because I have told Mr. Lowther that before he can get to that aspect of it I want to hear from him some authority. I have a question in my mind as to whether anything that came out of that conversation,  
224 whether it be on the tape or out of the mouth of this witness, can be received in evidence. I think your apprehensions are a little bit early,

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because I think Mr. Lowther has something of a burden there to show me that this is admissible evidence.

MR. GARBER. I would carry it a step further, Your Honor, in this respect, that I don't think any testimony of Mrs. Gross would be admissible--

THE COURT. About anything?

MR. GARBER. --which mentions the name of Jean Smith. The Smith name was used in those tape recordings. I don't think, therefore, on the basis of the fruit-of-the-poisonous-tree doctrine, that Mrs. Gross could testify about anything concerning Jean Smith.

THE COURT. I don't follow you, Mr. Garber. In other words, your point is, because a certain portion of her testimony would be inadmissible--and I speak now of the post February 20, 1963 or, let's be more specific, the alleged Gross-Laughlin telephone taped conversation--because that is inadmissible, the tape-recorded conversation is inadmissible--

MR. GARBER. Right.

THE COURT. --that no testimony can be given by Mrs. Gross that would mention Mrs. Smith, or mention any money given by Mrs. Gross to Mrs. Smith, or any meetings she might have had with Mr. Forte, 225 or any telephone conversation she might have had with Mr. Forte, or any meeting with Mr. Laughlin prior to February 20, 1963?

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MR. GARBER. I would take that position, on this basis, Your Honor, that if any evidence is suppressed or ruled inadmissible, that no testimony can be given concerning it.

THE COURT. Well, I'm not going to go to that extent. I will reject that from the bench. But I am going, gentlemen, to reserve my ruling with respect to the testimony that she would give that would have come from the alleged Gross-Laughlin telephone conversation.

Now we'll proceed.

MR. LAUGHLIN. Your Honor, with respect to that, so that there be no confusion, as to that extent, isn't then part of that going to have to be heard out of the presence of the jury, for you to determine?

THE COURT. What part?

MR. LAUGHLIN. Anything that went into those tape conversations, you have to know that, in order to rule, wouldn't you?

In other words, as I understand, your ruling is this: Anything that came out of those tape calls cannot be used. In other words, at least you are reserving ruling on that. Am I correct?

226 THE COURT. But I still don't follow you, sir. She can get on this stand, as I understand the law, and she can testify what happened between September 1961 and February 20, 1963, of her meeting with Jean Smith; her conversations, telephone or in person, with Mr. Forte; her connections with you and Mr. Forte; her receiving money from Mr. Forte;

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her delivering money to Jean Smith on behalf of Mr. Forte. That all came before the telephone conversations.

What I am saying is that the telephone conversations and that material may not be alluded to until we get a ruling.

MR. LAUGHLIN. Well, anyway, just so that the matter is fully preserved, Your Honor.

THE COURT. Your record is preserved, yes.

MR. LAUGHLIN. Our position is, in view of the state of the record and what we have said, that her testimony should first be heard out of the presence of the jury, having in mind the cases that were cited, Your Honor.

THE COURT. And I think you go one step further. At least Mr. Garber goes one step further, that anything now she might say is inadmissible because of the taint that followed from the tape recorded conversations. Is that correct?

MR. GARBER. Correct, Your Honor.

THE COURT. And I assume you join in it?

MR. LAUGHLIN. Yes, Your Honor.

227       And your view is this, Your Honor, that she should testify. And the things we think we are urging should be extracted in cross-examination?

THE COURT. As to credibility and the weight, sir. That's right.

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MR. LAUGHLIN. And of course you understand that she will be on for some length of time.

THE COURT. I assume that that's true. And of course she should be, because, after all, she is the vital witness, I assume, of the government; and certainly, therefore, she is vital as far as the defendants are concerned.

MR. LAUGHLIN. That's right.

THE COURT. But Mr. Lowther will not allude to or go into the matter of the post February 20, 1963 taped telephone conversations until he gets a ruling from this Court.

MR. LAUGHLIN. Your Honor, also I believe this, so we won't have what happened at the last time, I would ask now, before she comes in, that she be told not to make any reference to the litigation that is pending in the United States District Court for the District of Maryland, the suit that is pending over there.

MR. LOWTHER. She has already been told that, Your Honor.

228 MR. LAUGHLIN. If counsel will let me finish--he has a habit of interrupting--and also that no reference--she made a statement also at the last, I think, something about "during the last trial." Of course, if we bring it up, that's a different story, Your Honor.

THE COURT. I think actually that you have already brought up something about the last trial.

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MR. LAUGHLIN. Well, it's a little hard. I realize, that's rather a--

THE COURT. I think, in the effort to impeach Mrs. Smith, you referred to it.

MR. LAUGHLIN. Yes. It's pretty hard, Your Honor, to separate, because after all the jurors are intelligent.

THE COURT. I am going to have her come in here, however. I am going to remind her of her Fifth Amendment rights.

MR. GARBER. Your Honor, so the record will be perfectly clear, may I have a continuing objection to her testimony, on the grounds that I have--

THE COURT. Sir, I am going to construe my action this way, that I'm putting her on as a witness over the objection of both defendants--

MR. LAUGHLIN. That's right.

THE COURT. --because the position taken by the defendants, 229 as I understand it, is since the tape recorded evidence in the first trial was illegal, then she should really be removed from the scene and not be permitted to testify as to anything. Am I correct in that?

MR. GARBER. Correct, Your Honor.

THE COURT. Am I correct, Mr. Laughlin?

MR. LAUGHLIN. Yes, Your Honor; that protects it fully.

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THE COURT. With that understanding that I am ruling against you, of course as far as that aspect is concerned, it has to be a continuing thing, because you would stop her at the threshold, you see.

MR. LAUGHLIN. Yes. Otherwise--I think what Mr. Garber means, Your Honor--otherwise we would have to keep standing up.

THE COURT. Oh no; you've got your ruling, and you can't do anything about it, at least at this stage of this case.

MR. LAUGHLIN. Yes. I think that covers it fully, Your Honor.

THE COURT. I want to give you back, sir, the law review.  
(It was returned to Mr. Laughlin.)

And this, Mr. Lowther, is your memorandum. (It was returned to Mr. Lowther.)

MR. LOWTHER. Thank you, Your Honor.

230 (The witness, Mrs. Gross, is now in the courtroom.)

THE COURT. Mrs. Gross, you don't need to take the stand yet. You are Mrs. Bernice Gross, are you not?

MRS. GROSS. Yes, sir.

THE COURT. You have testified, I believe, in connection with this matter of Allan Forte and James J. Laughlin, both before a grand jury and in another trial in this case; is that right?

MRS GROSS. Yes, sir.

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THE COURT. You were advised, of course, of your constitutional rights then. I shall advise you again of them. I believe you are a former policewoman and know, undoubtedly, what these are.

MRS. GROSS. Yes, sir.

THE COURT. That you may not be compelled to testify against yourself. In other words, you may not be compelled to give any incriminating statement against yourself. And that if you should take the stand, of course you can be interrogated and cross-examined in connection with the material brought out in the direct examination.

You understand that, do you?

MRS. GROSS. Yes, I do.

THE COURT. And you are willing to testify, are you?

MRS. GROSS. Yes, sir.

231 THE COURT. Very well.

\* \* \*

238 BERNICE GROSS,

being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOWTHER:

Q Your name, madam, is Mrs. Bernice Gross--G-r-o-s-s?

Is that right?

A Yes, sir.

Bernice Gross - Direct Examination

Q Mrs. Gross, would you tell His Honor and these ladies and gentlemen of the jury your address, please.

A 2715 Uhler--U-h-l-e-r--Avenue, Baltimore, Maryland.

Q And were you living at the Uhler Avenue address in the years 1961, 1962 and 1963?

A Yes, sir.

Q And was there a time in your life when you were a member of the Baltimore City Police Department?

A Yes, sir.

Q When was that, please?

A February 1956 to February 1962.

Q And in February of 1962 you were relieved of duty in the department?

A Yes, sir.

Q Now I want to direct your attention, if I may, to the month of July of the year 1961, and ask you this question--and I ask you to answer it yes or no, please, Mrs. Gross:

239 In the month of July 1961, at St. Agnes Hospital in Baltimore, Maryland--yes or no--did you have occasion, as a policewoman of the Baltimore City Police Department, along with Lorraine Burrell, to interview a lady who has been identified and testified in this case named Jean T. Smith?

Bernice Gross - Direct Examination

A Yes, sir; I did.

Q And what squad were you working for or on, I should say, at the time that you interviewed Mrs. Jean T. Smith?

A Abortion squad.

Q Now I want to direct your attention, if I may, to the period, to the date, the month of February of the year 1962. After you left the Baltimore City Police Department, what was your next employment, if any, and when?

A Store detective at the Hecht Company, Northwood, in Baltimore.

Q Northwood?

A Northwood section.

Q Very well. And when did you start your employment as store detective at Northwood?

A In June of 1962.

Q Now in the period between the time you left the Baltimore City Police Department, and the time that you took your employment up with the Hecht Company in June of 1962, did there come a time when you  
240 had occasion to receive a telephone call from anyone whom you see and recognize in court today?

A Yes, sir.

Q And whom did you receive the call from?

A Dr. Forte.

Bernice Gross - Direct Examination

Q And would you be good enough to point out the defendant Forte to the Court and jury, please, at this time.

A At the far end of the table.

MR. LOWTHER. May the record indicate she has identified the defendant Forte, Your Honor?

THE COURT. The record will indicate the witness has identified Dr. Forte.

BY MR. LOWTHER:

Q Now when was it, as you best place it, that you received this telephone call from the defendant Forte in the year 1962, this first call?

A I would place it in May.

Q And where were you? That is, where were you when you received this phone call?

A At home.

Q And would you be good enough to tell the Court and these ladies and gentlemen of the jury your home telephone number during the years 1962 and 1963?

A Forest 7-7440.

241 Q And in order to dial that Forest exchange, the first two letters that you dial would be what?

A Three six.

Q No; I mean--

Bernice Gross - Direct Examination

A Oh, FO.

Q FO 7-7440?

A Yes, sir.

Q Now when you received this call from the defendant Forte, which your recollection is it was in May of 1962, what did Forte have to say to you, Mrs. Gross? Tell the Court and jury, please.

A Well, at first he told me he was sorry to hear about what happened in the police department. I had been dismissed. And then he asked me if I had spoken to Jean Smith since I was out. I told him no, I didn't. And then he asked me if I could help him, in so far as the abortion case was concerned. I told him I would see what I could do; I would call her and find out.

Q And what, if anything, did Forte ask you to do in calling Jean Smith at this time?

A Well, he told me that he was a sick man and that he was an old man, and he told me that she would be compensated for it, as well as I. And he told me to ask her if she could, when the trial came up, maybe she couldn't pick him out, or something to that effect.

242 Q All right.

A I don't recall every word he told me.

Q Very well, Did you call Jean Smith after Forte, the defendant Forte, had called you in May of 1962?

Bernice Gross - Direct Examination

A Yes, I did.

Q And would you recount for His Honor and these ladies and gentlemen of the jury, tell the Court and jury, what conversations if any you had with Mrs. Smith? First of all, were they by phone?

A Yes, they were.

Q Tell the Court and jury what you said to Mrs. Smith and what, if anything, Mrs. Smith had to say to you in this conversation in May of 1962.

A Well, after the preliminary "Hello" and "How are you," I asked her what she could do for the Doctor. She told me she couldn't lie. She said, "I can't lie." And she said she couldn't do anything. And I told her "Okay," and I hung up.

Q Now after you had this telephone conversation with Mrs. Smith that you have just told the Court and jury about, did you have occasion to call the defendant Forte back about your conversation with Mrs. Smith?

A No, I did not call him back.

243 Q And did you have occasion to hear from him, the defendant Forte, about your call?

A Yes, I did. He called me.

Q And what, if anything, did he say and what, if anything, did you say to the defendant Forte about the results of your telephone conversation with Mrs. Smith?

A The best I can recall is I told him what she said. And that was all.

Bernice Gross - Direct Examination

Q Now I want to direct your attention, if I may, to the fall of the year 1962, and roughly the month of October or late September of 1962. Had you or did you have occasion to receive--or, first of all, if I may withdraw that, Your Honor.

I want to show you, first of all, Mrs. Gross, a letter dated October 15, 1962, marked Government's Exhibit 2 for identification. With that letter before you on the stand, and that date in mind, October 15, 1962, in the fall of the year did you have occasion to hear again from the defendant Forte?

A Yes, I did.

Q And in relation to the date of that letter, October 15, can you tell the Court and jury when it was you heard from Forte in the fall?

A Oh, I believe it was September. I don't recall.

Q Very well. And could you place the call from the defendant  
244 Forte, in regard to the date of the October letter, as early September, mid September or late September?

A I couldn't tell you, Mr. Lowther.

THE COURT. I'm sorry.

THE WITNESS: I couldn't answer it, Your Honor.

THE COURT. Very well.

Bernice Gross - Direct Examination

BY MR. LOWTHER:

Q And what, if anything, did Forte have to say to you in this call which you place in September of 1962?

A To the best of my knowledge, I believe he told me he was getting another attorney; that the attorney he had had previously wasn't doing him any good, and he was getting Mr. Laughlin as his attorney; and Mr. Laughlin would get in touch with me. And that was it.

MR. LAUGHLIN. Your Honor, can I have the answer repeated, please?

THE COURT. You may.

Read the answer, Mr. Reporter.

(The last answer was read by the reporter.)

BY MR. LOWTHER:

Q Now in regard to the date of that letter, Government's 2 which you have on the stand before you, and the date of October 15, did there come a time in the month of October when you had occasion to receive a telephone call from the defendant Laughlin?

245 A Yes, sir.

Q And was this telephone call from the defendant Laughlin before or after the date of that letter, October 15, 1962?

A I would place it before.

Q Before?

Bernice Gross - Direct Examination

A Yes, sir.

Q And where were you, Mrs. Gross, when you got this telephone call?

A At the Hecht Company, in Baltimore.

Q Was that the Northwood store?

A The Northwood store.

Q And can you tell His Honor and these ladies and gentlemen of the Jury the telephone number of the Hecht Company's Northwood store, in the year 1962 and 1963, please?

A 433-8000.

Q And would that be the exchange Idlewood--ID 3-8000?

A Yes, sir.

Q Now I want you to tell His Honor and these ladies and gentlemen of the jury what if anything the defendant Laughlin had to say to you over the telephone on this first call.

A He introduced himself to me, and--

Q By name?

A By name.

Q Very well.

246 A --and he told me that he would be in the store that evening. And I told him "All right," that that would be all right. He asked me what time I had dinner. And I told him between six and seven. And he said he would be in the bakery.

Bernice Gross - Direct Examination

Q Now the evening of this call, Mrs. Gross, did you in fact have occasion to see and meet with the defendant Laughlin in the Hecht Company store in Northwood, Baltimore, Maryland?

A Yes, sir.

Q And would you tell His Honor and these ladies and gentlemen of the jury where in the store you first met the defendant Laughlin?

A Well, the store has three levels; and I met Mr. Laughlin on the main floor, which is the center level, at the bakery department.

Q All right. And can you tell the Court and jury how you received notification to go to that area of the bakery department?

A The store has a bell system. My bell was one bell. And I had gotten the bell and I answered the phone, and the operator told me to go down to the bakery department.

Q Very well. Now after you got down to the bakery department, was the defendant Laughlin there?

A Yes, sir.

Q And do you see him in court today?

247 A Yes, sir.

Q Would you be good enough, please, to point him out to the Court and jury.

A The man closest to me at the table.

Q Very well.

Bernice Gross - Direct Examination

THE COURT. The record will show that the witness has identified the defendant Laughlin.

BY MR. LOWTHER:

Q Now where, if any place--first of all, what if any conversation did you have with the defendant Laughlin, at the bakery department when you went there, the first time you met him?

A Mr. Laughlin asked me if there was a place where we could talk; and I told him yes, upstairs in the TV lounge.

Q And did you and the defendant Laughlin in fact go upstairs in the TV lounge?

A Yes, we did.

Q In point of time, between the time that you got the phone call from the defendant Forte, saying that he had gotten a new lawyer and the lawyer would be in touch with you, as you best recall it, how long after that was it that you got the call from the defendant Laughlin, the first call?

A I don't remember, Mr. Lowther.

248 Q Now when you got up to the TV lounge, what level of the Hecht Company store was that, please?

A That is the third level.

Q And when you got up there, I want you to tell His Honor and these ladies and gentlemen of the jury what if any conversation went on between yourself and the defendant Laughlin.

Bernice Gross - Direct Examination

A Mr. Laughlin and I discussed the Block case, which was the reason I was dismissed from the force. I told him briefly about what had happened. I also told him about a certain party in Baltimore that told me he could get me back on the Baltimore City Police Department for \$500. And then we discussed Jean Smith. And I told Mr. Laughlin she had told me she couldn't lie. And he said, "Well, that's ridiculous."

Q He said what?

A That it was ridiculous that she can't lie.

Q All right.

A Or words to that effect. I'm not using the exact words of the conversation.

Q All right--the substance of it, though.

A The substance, right.

Mr. Laughlin handed me his business card, and he told me he would keep in touch with me.

Q Very well. And how long, would you say, as you best recall it now, Mrs. Gross, did this conversation last between you and the defendant  
249 Laughlin, up there in the TV lounge of the Hecht Company store?

A Oh, I would put it at about 15 to 20 minutes, because I cannot hear the bell in the TV lounge, and I didn't want to be away from the store too long.

Bernice Gross - Direct Examination

Q Now, was there any discussion at that time between you and the defendant Laughlin about you getting in touch again with Jean Smith?

A I don't recall whether there was at that time.

Q Very well. Now in regard to this letter which you have on the stand before you, Government's Exhibit 2 for identification, dated October 15, 1962, did you have occasion to hear from the defendant Forte or the defendant Laughlin in regard to the writing of that letter before it was written?

A Yes, sir.

Q And from whom did you hear?

A I don't recall which one it was.

Q Now, from the individual as between the two of them that you did hear, what if any was the conversation between you and that individual?

A It was to have Jean write a letter, --

Q And--

A --such as this.

Q Did you have occasion to communicate, to call Mrs. Smith,  
250 after you had this communication from one or the other of the defendants?

A Yes, sir.

Q Now with regard to the date of that letter, October the 15th, 1962, and the file stamp on the letter which I think bears the date of October

Bernice Gross - Direct Examination

16, 1962, will you tell the Court and jury whether or not you learned that that letter had in fact, Government's 2, been received in the Office of the United States Attorney in the District of Columbia.

A You will have to repeat that, Mr. Lowther.

Q Yes, ma'am. After the date of that letter, October 15, 1962, did you learn, did you hear, that that letter had been received in the U. S. Attorney's Office?

A Yes, sir.

Q And did you learn that by a phone conversation, or face to face, or what?

A A phone conversation.

Q And from whom did you receive that information?

A It was either Dr. Forte or Mr. Laughlin.

Q And what if anything was said in regard to what effect that letter might have on the case, Criminal 741-61, the old abortion case?

A Well, they hoped that it would be dismissed.

Q Now did there come a time--and I am showing you now, if I  
251 may, Government's Exhibit numbered 3 for identification, a letter dated November 13, 1962--after you heard that the first letter, October 15, 1962, had been received, would you tell the Court and these ladies and gentlemen of the jury whether or not you had occasion to transmit, to give, turn over, any money to Mrs. Jean Smith?

Bernice Gross - Direct Examination

A Yes, sir.

Q And from whom did you receive the money to turn over to Mrs. Smith?

A Dr. Forte.

Q And where did you receive the money from the defendant Forte to turn over to Mrs. Smith?

A I met Dr. Forte at a men's club, called the Chesapeake Club. I don't recall the address. It was either the 2300 or 2400 block of Eutaw Place.

Q In Baltimore?

A In Baltimore.

Q And that is spelled E-u-t-a-w?

A E-u-t-a-w, yes, sir.

Q How did you learn, how did you know to go to the Chesapeake Club, to meet the defendant Forte there?

A Well, Dr. Forte called me in the morning, early in the morning.

Q And where did he reach you?

A At home.

252 Q And when you got to the Chesapeake Club, did you meet with the defendant Forte?

A Yes. He was inside.

Bernice Gross - Direct Examination

Q And how long after the first letter, that is, the October 15, letter, the date of October 15, was it that you first met with the defendant Forte in the Chesapeake Club on Eutaw Street, or Place, Baltimore, Maryland?

A Well, I don't recall. It was maybe a few days later. I don't remember.

Q How much money did you receive from the defendant Forte at that time?

A It was \$100.

Q And to whom, if anyone, did Forte say the money was for?

A For Jean Smith.

Q And was this money a check, cash, or what?

A Cash.

Q Now after you had received this money, a hundred dollars, did there come a time when you turned that money over to Mrs. Smith?

A I believe it was the same evening.

Q And where were you when you turned the money over to her?

A At the store, the Northwood store. She met me there.

253 Q And how did Mrs. Smith, if you know, know to come to the Northwood store to get the money?

A I called her.

Q And did she in fact come over there?

A Yes, she did.

Bernice Gross - Direct Examination

Q And of the hundred dollars, did you retain any part of it for yourself?

A Yes, sir.

Q How much?

A \$25.

Q And how much did you turn over to Mrs. Jean Smith of the hundred?

A \$75.

Q Now after Mrs. Smith had received the \$75 of the \$100, do you know of your own personal knowledge what she did with any part of that money?

A Yes, I do. When she came to the store, she was wearing a skirt that was too small on her. She was pregnant. She had safety pins. And I told her to go over and buy herself some clothes. And she did. She went over to the maternity department, and used my 20 per cent, and bought herself some skirts and blouses.

Q All right. Now in regard to the date of the letter, the second  
254 letter you have on the stand before you, November the 13th, the Dr. Goldberg letter, 1962, did there come a time, or was there a time, before that letter was sent, when you had occasion to go to the residence, to the home, of Mrs. Jean Smith?

A I did go to her home, yes, sir.

Bernice Gross - Direct Examination

Q And when you went to her home, had you been in touch, that is, had you met with Forte, the defendant Forte, before you went to Mrs. Smith's home?

A Yes, I did.

Q And where did you meet Forte at this second meeting?

A At the same place, the Chesapeake Club.

Q And at that time, what, if anything, did you receive from Forte?

A At that time I think it was \$200. I'm not sure.

Q Was there a time when you received a hundred-dollar bill from him?

A Yes, that's right, a hundred dollars.

Q Now, how did you know to meet the defendant Forte at the Chesapeake Club this second time?

A He called me at home early in the morning.

Q And did you meet him?

A Yes, I did.

Q And in regard to the hundred-dollar bill that you received from him, who was that for?

255 A Jean Smith.

Q And did you deliver that hundred-dollar bill to her?

A Yes, I did.

Q And where did you give it to her?

Bernice Gross - Direct Examination

A At her home in Catonsville.

Q In Catonsville, Maryland?

A Yes.

Q In regard to the hundred-dollar bill that you received from the defendant Forte for Mrs. Smith--and would you answer this question, first of all, yes or no--prior to the doctor's letter of November 13, 1962, and before you gave the hundred-dollar bill from Forte to Mrs. Smith--yes or no--had you had any conversation with the defendant Forte about the physical condition of Mrs. Smith as you saw her over in the Hecht Company store?

A Oh, yes, sir.

Q And I want you to tell the Court and jury what, if anything, you told Forte, the defendant, about Mrs. Smith's physical condition and about whether or not she had been to a doctor.

A Well, I told him just what she had told me, that she was in her seventh month; she hadn't been to a doctor yet; no doctor had seen her. And he thought it was terrible. Of course, being in her seventh  
256 month, she should have a doctor. And he told me to tell her to go to a Dr. Kline, in Baltimore.

Q And this hundred dollars, what if anything, if you know from conversations with Forte, what if anything did that have to do with Mrs. Smith going to the doctor?

Bernice Gross - Direct Examination

A Well, it was to help her financially with getting a doctor. She told me she didn't have any money for a doctor.

Q All right. Now, after--

THE COURT. Might this be a good time to stop for a morning recess?

\* \* \*

258 (Following the recess, the jury in the box:)

THE COURT. You may proceed.

BY MR. LOWTHER:

Q Mrs. Gross, I am showing you again what has been marked for identification purposes as Government's Exhibit 3 for identification, that letter of November 13, 1962, on the letterhead of Dr. Goldberg. Prior to the time that that letter was dispatched, was sent, will you tell the Court and these ladies and gentlemen of the jury if you have a recollection now of having talked with the defendant Laughlin about that letter to be sent.

A Mr. Lowther, I spoke to both, yes, sir.

Q Both of them?

A Yes, sir.

Q When you say "both," you mean?

A Mr. Forte and Mr. Laughlin.

Bernice Gross - Direct Examination

Q And what was said in regard to the sending of that letter, the Government's exhibit, the November 13 letter?

A Either one, one of them told me, that a letter showing pregnancy might help, too.

Q In regard to what?

A In regard to the abortion case against the Doctor.

Q Now after that letter of November 13, 1963 had been sent,  
259 did you hear anything about its being received in the United States Attorney's Office in the District of Columbia?

A Whenever a letter was received, I heard about it.

Q And in regard to that letter there, --

THE COURT. Just one minute. Let's get it clear. With respect to this particular letter, you heard about it?

THE WITNESS. Yes, sir; I heard about it.

BY MR. LOWTHER:

Q And do you have a present recollection, as between the two defendants, Laughlin and Forte, from whom did you hear that the November 13 doctor's letter had been received?

A I can't say for sure, Mr. Lowther.

Q You have no recollection at the present time?

A No, sir.

MR. LOWTHER: Will you indulge me a moment, please,  
Your Honor?

Bernice Gross - Direct Examination

THE COURT. Yes.

BY MR. LOWTHER:

Q I want to show you page--

THE COURT. What is the date of it?

MR. LOWTHER. Your Honor--excuse me--it's--

MR. LAUGHLIN. Your Honor, so we may know, we would like to know the volume and page number.

THE COURT. We're getting that right now.

260 MR. LOWTHER. It is the date of April the 20th, 1964, Your Honor, pages 192 dash 287; and I am referring to page 231.

MR. LAUGHLIN. Your Honor, will you allow us to find that?

THE COURT. Surely. If you will just wait a minute, we will both find it.

MR. LAUGHLIN. What page is counsel referring to?

THE COURT. Page 231, Mr. Laughlin. Take a look at the bottom of the page, I think Mr.--

MR. LAUGHLIN. Very well.

BY MR. LOWTHER:

Q I want to show you, Mrs. Gross, page 231 of this transcript. I am referring you to the bottom of the page, and I want you to read that to yourself, not out loud, but to yourself, please (handing). (The witness read to herself.)

Bernice Gross - Direct Examination

Having read that to yourself, do you now have a recollection as to which of the defendants it was that you learned--from which of the defendants it was you learned--that the November 13 doctor's letter had been received in the U. S. Attorney's Office here in Washington, D. C.?

A Mr. Laughlin.

Q Very well.

Now after you had received the information about the receipt  
261 of that letter of November 13, 1962, did there come a time when you had occasion, in the month of November--and I'm not talking about the hundred-dollar-bill incident; I'm talking about later on--did you have occasion, in the month of November, to transmit any more money to Mrs. Smith?

A Yes, sir.

Q And do you recall where it was that the money was transmitted, this second payment, in November of 1962?

A At the Northwood store.

Q The Hecht Company?

A The Hecht Company.

Q And in point of time from the date of that letter, that is, November 13, and the file stamp that it was received on such and such a date, how long was it after that that you gave any money to Mrs. Smith in the Hecht Company Northwood store?

Bernice Gross - Direct Examination

A I would say within that month of November; but I don't recall when.

Q And from whom did you get the money to give to Mrs. Smith, the second payment, in November of 1962?

A Dr. Forte.

Q And where did you get the money? Where did Forte, the defendant, give you this money?

A I think this time it was on the outside of the Chesapeake Club.

262 Q The same club?

A The same club.

Q And do you recall, Mrs. Gross, how much money it was that you gave to Mrs. Smith this second time, in the month of November?

A I believe that was \$200.

Q And was that in cash or by check?

A Cash.

Q And do you have a recollection as to what, if you know, what if anything Mrs. Smith did with any part of the \$200 that you gave her, the second payment, in the month of November, 1962?

A Yes. She went to our will-call desk, which at the store is the desk where they also write checks for you. She told me that she had to send a check to the doctor, and I believe a deposit for the hospital.

Bernice Gross - Direct Examination

Q All right. Now, in the month of December of the year 1962, did you have occasion yourself to receive any money for yourself from either of these defendants?

A Yes, sir.

Q Who did you receive the money from?

A Dr. Forte.

Q And how much money was it?

A A hundred dollars.

263 Q And that was for whom?

A For myself.

Q Now I want to show you--

MR. LOWTHER. And will Your Honor indulge me for a moment, please?

Your Honor, may this item receive a mark as Government Exhibit numbered 5 for identification, please? And I would ask, Your Honor, instead of having a sticker put on, may it be put on in handwriting, if you please, sir?

THE COURT. It may.

(A telephone company punched card indicating call to Washington from Baltimore was marked for identification as Government's Exhibit No. 5.)

(The last-marked exhibit was handed to defense counsel.)

Bernice Gross - Direct Examination

MR. LOWTHER. Your Honor, perhaps I can assist counsel if I may give them some information as to date, since that card doesn't have it.

THE COURT. You may step over and tell them.

BY MR. LOWTHER (Having spoken to defense counsel):

Q Mrs. Gross, I want to show you, if I may, --

THE COURT. May I see it too, please?

MR. LOWTHER. Yes indeed, Your Honor (the last marked exhibit being handed up).

264 THE COURT. I have seen it.

BY MR. LOWTHER:

Q I want to show you, if I may, Mrs. Gross, Government's Exhibit No. 5 for identification. And for purposes of my question, when I show it to you, I want you to assume that this telephone card reflects a person to person collect call by you, Mrs. Bernice Gross, to Dr. Allan Forte, at the number Taylor 9-3377. I want you to look at this, if you will, please (handing). The number TA 9-3377 appears up at the top, in print--"829," actually.

THE COURT. What was that?

MR. LOWTHER. "829," Your Honor.

THE COURT. Instead of "TA"?

MR. LOWTHER. It is, Your Honor.

Bernice Gross - Direct Examination

BY MR. LOWTHER:

Q Having looked at that card, and with the assumption I ask you to take, that that reflects a call on December 1, 1962, from your home phone to the number Taylor 9-3377, my question to you, first of all, madam, is this: Did you have occasion, in the month of December of the year 1962, to talk to the defendant Forte from your home phone?

A Yes, I did.

Q And did you talk with the defendant Forte at that number, TA-- Taylor--9-3377, in Washington, D. C.?

265 A Yes, sir.

Q Now in regard to that call there, the December 1 call, first of all--

MR. LOWTHER. May I withdraw that, please, Your Honor? And may this be marked, please, sir, as Government's Exhibit 6 for identification?

THE COURT. It may be so marked.

(Another telephone company card indicating a call to Washington from Baltimore was marked for identification as Government's Exhibit No. 6.)

MR. LOWTHER. And may I pass it up to the Court, please?  
(The last-marked exhibit was handed up.)

THE COURT. Very well; I have seen Government's Exhibit 6 for identification.

Bernice Gross - Direct Examination

(The last-marked exhibit having been handed to defense counsel:)

BY MR. LOWTHER:

Q I want to show you now, if I may, Mrs. Gross, and before I ask you the question I want you to assume that this telephone ticket reflects a collect, charges accepted, person to person call from Baltimore, Maryland, to Taylor 9-3377, the person called, Allan Forte, Georgia Avenue, from Mrs. Bernice Gross, and the date being December 3.

266 I want you to look at that, and ask you again the question, did you have occasion to talk with the defendant Forte on the date of that telephone ticket, namely, December 3, 1962?

A Yes, sir.

Q Now I want to show you, if I may, --

MR. LOWTHER. Will you indulge me one moment, please, Your Honor?

THE COURT. Certainly.

MR. LOWTHER. And may this be marked, if Your Honor pleases, Government's Exhibit numbered 7 for identification?

THE COURT. It may.

(A portion of telephone bill listing long distance calls was marked for identification as Government's Exhibit No. 7.)

(The last-marked exhibit was handed up.)

THE COURT. Very well; I have seen it.

Bernice Gross - Direct Examination

BY MR. LOWTHER (The last-marked exhibit having first been handed to defense counsel):

Q Showing you now this document which is Government's Exhibit No. 7 for identification, and having in mind the questions I asked you, that these two are the calls of December 1 and December 3, Mrs. Gross, which were person, collect, from yourself to Taylor 9-3377, would you look at this document here, Government's Exhibit numbered 7, and see if you  
267 see thereon two collect calls on Taylor 9-3377, on the 1st and 3d of December, from Baltimore, Maryland.

A Yes, sir.

Q All right. Now, in regard to these phone calls here, would you tell the Court and jury what these calls to Dr. Forte concerned, having in mind the \$100 that you say you got from Dr. Forte in December of 1962.

A It concerned a Christmas present of a hundred dollars.

Q From whom to whom?

A From Dr. Forte to myself.

Q And did both calls, were they concerned with that?

A I don't remember, Mr. Lowther.

Q All right.

Now in regard to the date of January the 20th, and before that time, of the year 1963--

Bernice Gross - Direct Examination

Well, first of all, did it come to your knowledge that Mrs. Smith had given birth to a youngster, to a child?

A Yes.

Q And in regard to the date of the birth, do you recall when it was?

A I think it was 1964, January of 1964.

Q And did you have occasion to have sent anything from the Hecht Company to Mrs. Smith, after her child was born?

A Yes, sir.

268 Q And what, if anything, did you have sent to her home?

A It was a complete layette for the new-born baby.

Q And at whose request, if either of these defendants did make the request, at whose request was it that the layette be sent to Mrs. Smith?

A Dr. Forte.

Q And--

THE COURT. Just one minute, please. When was this sent?

THE WITNESS. The baby, I believe, was born in January of 1964, last year--if I'm not mistaken. I may have my years wrong.

BY MR. LOWTHER:

Q Let me ask you this question: Do you recall the date of the start of the trial in Criminal No. 741-61, the old abortion case--the month?

A The abortion case?

Bernice Gross - Direct Examination

Q Yes. First of all, let's get at it this way: The year, do you recall that?

A I think it was the latter part of 1962. I'm not sure, Mr. Lowther.

Q Very well.

A I have my years mixed up?

269 MR. LAUGHLIN. Your Honor, she lets her voice drop. Would you ask her to keep her voice up, please?

THE COURT. Very well. You may read that answer, Mr. O'Neal, so that Mr. Laughlin will know what the answer was with the dropped voice.

(The last two answers were read by the reporter.)

BY MR. LOWTHER:

Q All right, Mrs. Gross, if you will keep this in mind, please, and I am looking now at the court file, of this Court, in 741-61, the old abortion case, that the trial commenced in February of 1963. Now with that date in mind, do you have a recollection as to when Mrs. Smith gave birth to her youngster?

A Yes, I have.

Q When was it?

A It was January of 1963.

Q Now in regard to this layette, you say which of these defendants, if either, requested that it be sent to Mrs. Smith?

Bernice Gross - Direct Examination

A Dr. Forte.

Q And was it sent, to your knowledge?

A Yes, it was.

Q And I want to show you now, after it has been marked--

MR. LOWTHER. And may this receive a mark, if Your Honor please, as Government's Exhibit numbered 8 for identification, please, sir?

THE COURT. It may.

(Hecht Company sales receipt was marked for identification as Government's Exhibit No. 8.)

THE COURT. I have seen Government's Exhibit 8 for identification.

(The last-marked exhibit having been handed to defense counsel:)

BY MR. LOWTHER:

Q Showing you this slip of paper, Government's Exhibit 8 for identification, Mrs. Gross, would you look at that, please. What is that paper?

A This is a sales receipt from the Hecht Company

Q And what if any connection does that sales receipt have with the layette that you say you sent to Mrs. Smith in January of 1963 at the request of the defendant Forte?

A This is the sales receipt that was on the package that was delivered to Jean Smith.

Bernice Gross - Direct Examination

Q And on whose account was that layette bought?

A Mine.

Q And who, if anyone, reimbursed you for the price of the layette?

A Dr. Forte reimbursed me.

Q Now, in regard to--

MR. LOWTHER. Will you indulge me a moment, please,  
Your Honor?

271 BY MR. LOWTHER:

Q In regard to the month of January, 1963, and this letter which bears the mark of Government's Exhibit numbered 4 for identification, I want you first of all to read that letter to yourself, please (handing).

A (Having read) Yes, sir.

Q Now in regard to that January 20 letter, first of all can you tell the Court and these ladies and gentlemen of the jury, before that date of January 20, 1963, the date of that letter, whether or not you had any conversations with the defendant Laughlin in regard to the writing of such a letter?

A Yes, sir.

Q And were those conversations by phone or in person?

A By phone.

Q And would you tell His Honor and these ladies and gentlemen of the jury what if anything the defendant Laughlin had to say in regard to the sending of the letter, if anything, such as that, that joint letter?

Bernice Gross - Direct Examination

A Mr. Laughlin told me by phone that he believed a joint letter from Jean and her husband would have a better effect on the forthcoming case.

Q And did the defendant Laughlin, when he said it would have a better effect on the forthcoming case, to what case was he referring, did he refer?

272 A The abortion case.

Q And did he explain to you why he, the defendant Laughlin, thought that a joint letter would have a better effect on the forthcoming abortion case?

A I don't remember, Mr. Lowther.

Q Very well.

Now, prior to the date of that letter of January 20, 1963, had you received more than one telephone call from the defendant Laughlin about Mrs. Smith and her husband writing such a letter?

A Yes, sir.

Q And with that date in mind, January 20, 1963, can you tell the Court and jury, as you best recall, how many calls had you received from the defendant Laughlin with respect to the writing of that letter?

A I would say three, three or four.

Q Three?

A Three to four.

Bernice Gross - Direct Examination

Q And in these calls, the substance, if you can't remember it verbatim, the substance of what the defendant Laughlin wanted you or wanted Jean Smith to do in regard to the writing of that joint letter?

A Mr. Laughlin had told me to call Jean and tell her to write  
273 this letter, which I did. Jean hadn't written it for several days. Maybe a week had passed before she had written the letter. Jean told me she couldn't word the letter right; she didn't know what to say.

I called Mr. Laughlin and I told him that, and he gave me some of the words that are right on this letter to tell Jean.

Q All right. Now do you recall where you were at the time you received the call from the defendant Laughlin in regard to the composition of that letter?

A Yes, sir. I was in my home, in the kitchen.

Q And do you recall what day of the week it was?

A It was Sunday.

Q And when you say you were at home, in the kitchen, did you take shorthand?

A Yes, sir.

Q And, having read that letter to yourself, can you tell the Court and these ladies and gentlemen of the jury whether or not any part or words or wording in that letter was given you over the phone by the defendant Laughlin?

Bernice Gross - Direct Examination

A Yes, sir. I can recall a few, that I couldn't write in shorthand, and I wrote it in longhand. One was "rekindle"--"humiliation"--"embarrassment." Those are three that I can recall.

274 Q After you had talked with the defendant Laughlin by phone and had taken those words down in the letter in shorthand, did you talk with Mrs. Smith?

A I called Mrs. Smith and gave her the subject of the letter, with these words in it.

Q All right. And did you at any time after January 20, 1963 learn whether or not that letter of January 20, 1963 had been received in the Office of the United States Attorney here in the District of Columbia?

A Yes, I did.

Q And do you recall, as of the present, from whom you heard that the letter had been received?

A No, I do not recall.

Q All right. Now, --

MR. LOWTHER. Will you indulge me a moment, please, Your Honor.

BY MR. LOWTHER:

Q After that letter had been received, the January 20 letter, --

MR. LOWTHER. And will you indulge me one moment, please, Your Honor?

Bernice Gross - Direct Examination

THE COURT. Certainly.

MR. LOWTHER. I am referring now to the same volume, Your Honor, page 192 to 287, and I am going to ask the witness to read to herself pages 225, 226, 227 and the top of 228.

275 THE COURT. In other words, all of 225, all of 226, all of 227, and the top of 228? Is that correct?

MR. LOWTHER. That is correct, sir.

MR. LAUGHLIN. Your Honor, may I have the page numbers again?

THE COURT. 225, 226, 227 and the top of 228, Mr. Laughlin.

MR. LAUGHLIN. Thank you.

BY MR. LOWTHER:

Q (Handing volume) To yourself, please, Mrs. Gross.

Now having read those pages to yourself, I ask you this question: Do you now have a recollection as to who told you that the January 20, 1963 letter had been received in the Office of the United States Attorney?

A Mr. Laughlin.

Q And having read those pages, do you have a recollection of you yourself having a conversation with the defendant Laughlin concerning Jean Smith and the letter of January 20, and money?

A Yes.

Bernice Gross - Direct Examination

Q And would you tell His Honor and these ladies and gentlemen of the jury what that conversation was, please, Mrs. Gross?

276 A I told Mr. Laughlin that I thought Jean should get some money for writing the letter. And he, Mr. Laughlin, said he would get in touch with Dr. Forte.

Q And when was this? Was this in a phone conversation, the last thing that you have testified to?

A Yes, sir.

Q And where were you at the time you made the call and told the defendant Laughlin that Mrs. Smith should get some money for writing the letter, and the defendant Laughlin said he would get in touch with the defendant Forte?

A I was in Baltimore. But I don't remember whether I was home or at work.

Q Very well. And after that phone call of yourself to the defendant Laughlin, did you in fact hear from the defendant Forte?

A Yes, sir.

Q And in person or by phone?

A By phone.

Q And as a result of that conversation, where if any place did you go?

A To the Chesapeake Club.

Bernice Gross - Direct Examination

Q And what if anything did you receive from the defendant Forte in the month of January by way of money, if anything?

A I received \$200 for Jean Smith.

277 Q And where were you when you got the \$200 from the defendant Forte for Jean Smith?

A Where was I?

Q I mean, inside the club, or out, if you recall.

A At one time--I don't remember which time it was--I met Dr. Forte outside the club. Whether it was this time or not, I don't recall.

Q Did you transfer or give the money that you got in January from the defendant Forte to Mrs. Smith?

A Yes, sir.

Q And where did you give it; where were you when you gave the money to her?

A At the Hecht Company, Northwood.

Q Now in regard to hearing from the defendant Laughlin that the letter of January the 20th had been received, can you tell the Court and jury whether or not the defendant Laughlin had anything to say about what effect that joint letter of January the 20th would have on the abortion case, 741-61?

A He was hoping that it would be dismissed.

Q All right. Now in regard to--

Bernice Gross - Direct Examination

MR. LOWTHER. Will you indulge me a moment, please, Your Honor?

THE COURT. Surely.

MR. LOWTHER. Your Honor, may this receive a mark as  
278 Government's Exhibit numbered 9 for identification, please, sir?

THE COURT. It may be so marked.

(A portion of telephone bill listing long distance calls was marked for identification as Government Exhibit No. 9.)

THE COURT. I have seen it.

(The last-marked exhibit having been handed to defense counsel:)

BY MR. LOWTHER:

Q I want to show you, Mrs. Gross, if I may, this piece of paper bearing the number now of Government's Exhibit 9 for identification (handing). And first of all, in regard to that telephone number up here, 367-7440, whose number was that?

A Mine.

Q And I want to direct your attention, if I may, to the item that appears under the date of 1-20, meaning January 20, to a place called Washington, D. C., and the number called Emerson 2-1776, and the letter of January 20th that you have before you on the stand.

Can you tell the Court and these ladies and gentlemen of the jury whether or not on that date, from your home number, you had occasion

Bernice Gross - Direct Examination

to call Emerson 2-1776 in Washington, D. C., and talk with the defendant Laughlin?

279 A Yes, sir.

Q And that call concerned what?

A It concerned this letter.

Q All right. Now, --

MR. LOWTHER. Will you indulge me a moment, please, Your Honor?

May this, Your Honor, receive a mark as Government's Exhibit numbered 10 for identification, please?

THE COURT. It may be so marked.

(Telephone company card indicating call to Washington from Baltimore was marked for identification as Government's Exhibit No. 10.)

THE COURT. I have seen it.

(The last-marked exhibit having been handed to defense counsel:)

BY MR. LOWTHER:

Q Showing you this telephone card, Mrs. Gross, which bears now the number of Government's Exhibit 10 for identification, and assuming for the purposes of my question that this card reflects a person to person, collect, charges accepted call, from Baltimore, Maryland to Washington, D. C., the number National--NA--8-2001, from the Hecht Company store in Baltimore, with no coin, --

Bernice Gross - Direct Examination

THE COURT. No what?

280 MR. LOWTHER. No coin, Your Honor.

BY MR. LOWTHER:

Q Can you tell His Honor and these ladies and gentlemen of the jury, did you have occasion during the months of October, November, 1962, and January and February of 1963, to talk to the defendant Laughlin at the number National--NA--8-2001 in Washington, D. C.?

A Yes, sir.

Q Now did you talk, can you tell the Court and jury this, Mrs. Gross, on any of the times, that, when you talked with the defendant Laughlin, did you talk with--or about, I should say--anything other than the old abortion case, Criminal 741-61.

A Yes, I spoke to him about something else.

Q Can you tell the Court and jury this, in regard to the telephone calls that you had as between you and the defendant Laughlin, whether or not most of the matter concerned the old abortion case?

A Mr. Lowther, what were the dates again?

Q October, November, of 1962, and January--I will limit it to that--of 1963.

A No; it was only the abortion case.

Q All right. Now then, --

Bernice Gross - Direct Examination

281 MR. LOWTHER. Will you indulge me a moment, please, Your Honor?

MR. LAUGHLIN. Your Honor, I am a little confused in my notes. I had understood that the witness had testified that other matters were talked about. Can I have the reporter verify that?

THE COURT. Read the answer back, Mr. O'Neal, from the time Mrs. Gross asked what the dates were.

THE REPORTER (reading):

"Question: October, November, of 1962, and January--I will limit it to that--of 1963.

"Answer: No; it was only the abortion case."

MR. LAUGHLIN. Your Honor, the question follows as the exhibit being identified. And--

THE COURT. Come to the bench.

MR. LAUGHLIN. --to assist us in the cross-examination--

THE COURT. Come to the bench.

(At the bench:)

THE COURT. What is the problem here?

MR. LAUGHLIN. Your Honor, the point is this. To assist us in cross-examination, we ought to know specifically what conversation she is talking about. We ought to know the date of it.

Bernice Gross - Direct Examination

THE COURT. She said October and November, 1962, and  
282 January, 1963.

MR. LAUGHLIN. But she hasn't said any dates.

THE COURT. On cross-examination you will be able to bring  
that out.

MR. LAUGHLIN. Your Honor, as long as we are here, would  
counsel be prepared to tell us, United States counsel, how long he thinks  
he will be on this direct? The reason I ask the question, of course we  
have a lot of material to assemble for cross, and we would like to assemble  
it in as orderly a manner as possible.

THE COURT. I suppose it will be a couple of days.

MR. LOWTHER. No; I should think I can very probably finish  
with the witness in an hour.

MR. LAUGHLIN. Well, Your Honor, I wonder if you would  
do this. That would take it up to probably three o'clock. Would you then  
recess until tomorrow morning, so we can go over it?

THE COURT. What I will do is this, gentlemen: When Mr.  
Lowther closes his direct, we will recess until tomorrow morning, and  
with this condition, that unless Mr. Lowther has something to complete  
in the morning, something he wants to add, you can go on in the morning.

MR. LAUGHLIN. Thank you.

283 THE COURT. We will do that, and you can plan on it that way.

Bernice Gross - Direct Examination

MR. LAUGHLIN. I understand. Thank you.

Would Your Honor want to recess now?

THE COURT. No. We have about five more minutes yet.

(In open court:)

MR. LOWTHER. Your Honor, may this receive a mark as Government's Exhibit 11 for identification, please?

THE COURT. It may be so marked.

(Another telephone company card, indicating call to Washington from Baltimore, was marked for identification as Government's Exhibit No. 11.)

THE COURT. I have seen it.

(The last-marked exhibit having been handed to defense counsel:)

BY MR. LOWTHER:

Q Now, Mrs. Gross, if you will, please, for purposes of this question I want you to assume that the document I am about to show you, a telephone card bearing Government Exhibit No. 11 for identification, shows a person to person call, from yourself to an individual on the card here, James Laughlin, and that the number called, the number to which the call was placed, was National 8-1690, and that the number called was Forest 7-7440. If you will look at this card, please, Mrs. Gross, and  
284 specifically to this number here, 628-1690. And my question to you is, --

THE COURT. I am a little bit confused, Mr. Lowther.

Bernice Gross - Direct Examination

MR. LOWTHER. National 8, Your Honor.

THE COURT. Was the call to National 8, or from National 8?

MR. LOWTHER. To, Your Honor.

THE COURT. From Forest?

MR. LOWTHER. From Forest 7-7440, to National 8-1690.

THE COURT. And the date?

MR. LOWTHER. February the 19th, 1963, at 4:45 p.m.,  
for two minutes 47 seconds; and the charge was 50 cents.

THE COURT. You are assuming all of that?

MR. LOWTHER. I am, sir.

MR. LAUGHLIN. Your Honor, may I see the exhibit a moment?

THE COURT. All right. Mr. Laughlin wants to see the exhibit a moment.

MR. LOWTHER. Very sell, sir. (handing the exhibit).

MR. LAUGHLIN. Your Honor, the exhibit seems to be--

THE COURT. The exhibit I think will be further identified, sir, by someone who is more of an expert than Mrs. Gross is, I imagine, on those punch cards. I assume somebody from the C&P Telephone Com-  
285 pany will come down here and explain them.

MR. LOWTHER. Quite correct, Your Honor.

THE COURT. This is an assumption, however, you understand. You are assuming that these facts appear on that card.

Bernice Gross - Direct Examination

BY MR. LOWTHER:

Q And with those statements I have made as assumptions, and specifically, Mrs. Gross, in regard to this number up here, "To C. O.," meaning Central Office, No. 1690--National 8-1690--can you tell His Honor and these ladies and gentlemen of the jury, did you have occasion to talk with the defendant Laughlin at that number, National 8-1690, in Washington, D. C., during the period of October of 1962 to February of 1963?

A Yes, sir.

Q All right. Now, --

MR. LOWTHER. Your Honor, I wonder if Your Honor would see fit at this time to take the noon recess?

THE COURT. I think it would be a good time.

Ladies and gentlemen of the jury, we are going to take our noon recess now until 1:45. You will stay with the Marshal who will take you down to your lunch, as you were doing last week. But you will bear in mind you may not speak to anyone, no one may speak to you, and you may not even speak among yourselves about this case. If anybody attempts  
286 to speak to you about it, you will let me know. You will not read about it, hear it over the radio, or watch it on TV. Please bear that in mind. One forty-five.

(Accordingly at 12:30 p.m. the luncheon recess was taken until 1:45 this afternoon.)

Bernice Gross - Direct Examination

## AFTERNOON SESSION

(The jury is in the box.)

THE COURT. You may proceed, Mr. Lowther.

BY MR. LOWTHER:

Q Mrs. Gross, in regard to the letter of November the 13th, 1962, which I will show you on the stand now, and which bears Government exhibit number 3 for identification, do you have a recollection at this time as to who, if either of these two ~~defendants~~, asked you to get Mrs. Smith to write that letter?

A Mr. Laughlin.

Q All right. Now in regard to the time you first met defendant Laughlin in the Hecht Company over there in Maryland in October of 1962, do you have a recollection of whether or not the defendant Laughlin gave you anything, Mrs. Gross, left anything with you?

A He gave me a card, his business card.

287 Q His business card?

A Yes, sir.

Q And in regard to that business card given to you by the defendant Laughlin, do you recall whether or not he wrote anything, the defendant, on that card?

A Yes; he wrote his home phone number on the back of it.

Q And in regard to the phone numbers on the card itself, the printed part of the card, do you have a recollection as to how many, if there was more than one phone number, was on the card?

Bernice Gross - Direct Examination

A There were two.

Q Now I want to show you, if I may, --

MR. LOWTHER. And may this, Your Honor, receive a mark as Government's Exhibit numbered 12 for identification, please?

THE COURT. It may be so marked.

(A telephone company card indicating call to Baltimore from Washington was marked for identification as Government's Exhibit No. 12.)

THE COURT. I have seen it.

(The last-marked exhibit was handed to defense counsel.)

BY MR. LOWTHER:

Q Mrs. Gross, I am going to show you this card, and I want you to assume for purposes of my question that this card, Government's  
288 Exhibit No. 12 for identification, reflects a day dial, that is, a station to station call, from National 8-1690, in Washington, to Idlewood 3-8000 in Baltimore, Maryland, at about a little after three in the afternoon, with a charge of 35 cents.

THE COURT. What date? Did you give a date?

MR. LOWTHER. Yes, Your Honor--October 11, 1962.

BY MR. LOWTHER:

Q With that card before you, do you have a recollection at this time as to whether or not it was, and with the date of the first letter in

Bernice Gross - Direct Examination

mind, that is, October 15th, 1962, the first letter of Jean Smith, do you have a recollection as to whether or not it was on or about October 11, the date of that toll ticket, phone call, that you spoke with the defendant Laughlin about him coming over to see you?

A Yes, sir.

Q And what is your recollection? That it was on or about that day?

A Yes, sir.

Q Very well. Now I want to show you, if I may--

MR. LOWTHER. Will Your Honor indulge me a moment, please?

MR. LAUGHLIN. Your Honor, I thought there was a question  
289 pending. I thought the witness was asked, "What is your recollection?"

THE COURT. Yes. And she said yes, that it was her recollection.

MR. LAUGHLIN. Oh, I see. I thought she was going to relate something else.

THE COURT. Do you want the reporter to read it to you?

MR. LAUGHLIN. Oh no, if that's all it was, Your Honor. I thought she was going to relate something.

BY MR. LOWTHER:

Q And the question in regard to that telephone toll ticket, Government's Exhibit 12 that I just showed you, of October 11, 1962, is it your

Bernice Gross - Direct Examination

recollection that it was on or about that date that the defendant Laughlin did in fact call and did in fact talk to you in person?

A Yes, sir.

MR. LOWTHER. Now, if the Court please, may this be marked for identification as Government Exhibit 13?

THE COURT. Very well.

(Telephone company card indicating call to Baltimore from Washington was marked for identification as Government Exhibit No. 13.)

THE COURT. Very well. I have seen it.

(The last-marked exhibit was handed to counsel for defendants.)

290 BY MR. LOWTHER:

Q I want to show you two items, Mrs. Gross, at this time. First of all let me hand you this letter dated October 15, bearing Government Exhibit No. 2, and refer you to the time stamp, October 16, 9:30 a.m. 1962, U. S. Attorney's Office.

And then I want to show you this card which, for purposes of my question, I want you to assume shows a person to person call, to Bernice Gross, at Idlewood 3-8000-- which was what number?

A The Hecht Company.

Q --from the number National 8-2001, at about 12 noontime, on October 16, 1962, with the charge of 50 cents.

Bernice Gross - Direct Examination

Assuming those things, and in reference to the date, the time stamp of this letter here, can you tell the Court and the ladies and gentlemen of the jury whether or not on October the 16th--assuming that that is the date that that phone call was made to Mrs. Bernice Gross--did you talk with the defendant Laughlin on October the 16th?

A Yes, sir.

Q And on that date of that call, and in reference to that letter dated October the 15th, time stamped in our office October 16 at 9:30 a.m., can you tell the Court and jury your recollection as to what the subject-  
291 matter of the phone call on October the 16th to you at the Hecht Company from National 8-2001 was?

A Mr. Laughlin informed me that this letter had been received here in Washington.

Q Very well.

MR. LOWTHER. Will you indulge me one moment, please, sir?

THE COURT. Very well.

MR. LOWTHER. May this, Your Honor, receive a mark as Government's Exhibit No. 14 for identification?

THE COURT. Very well, Government's 14 for identification.

(Telephone company card indicating call to Baltimore from Washington was marked for identification as Government's Exhibit No. 14.)

Bernice Gross - Direct Examination

THE COURT. I have seen it, Government's Exhibit 14 for identification.

(The last-marked exhibit having been handed to defense counsel:)

BY MR. LOWTHER:

Q Now I want to show you this card, Mrs. Gross, which bears Government exhibit number 14 for identification, the marking, and for purposes of my question I want you to assume that this telephone company 292 record shows a direct dial, a station to station call, on October the 18th, 1962, from the number National 8-1690, in Washington, D. C., to Idlewood 3-8000, in Baltimore, Maryland, at about 8:35 p.m., with a talking time of roughly six minutes, and a charge of 65 cents, October the 18th, 1962.

Looking at that card and assuming what I asked you to assume to be true, did you have occasion on October the 18th, 1962, at 8:35 p.m. in the evening hours, at the Hecht Company store, to talk with the defendant Laughlin?

A Yes, sir.

Q Do you have a present recollection as to what the subject-matter of the phone call of six minutes, roughly, on that date in the evening was?

A No, I don't.

Q Very well.

Bernice Gross - Direct Examination

Can you tell the Court and jury this, in relation to the date which I have asked you to assume that toll ticket represents, namely, October the 18th, a Tuesday--excuse me; I will put my glasses on--a Thursday, October the 18th, 1962, can you tell the Court and these ladies and gentlemen of the jury whether or not the subject-matter of that telephone conversation concerned the old abortion case, Criminal No. 741-61?

A Yes, sir.

293 MR. LOWTHER. Will you indulge me one moment, please, Your Honor?

THE COURT. Very well.

MR. LOWTHER. Your Honor, may these cards receive numbers, respectively, Government Exhibit 15 for identification, please, sir, and Government Exhibit 16 for identification?

THE COURT. Telephone cards, are they?

MR. LOWTHER. Yes, they are, Your Honor.

THE COURT. Very well.

(The two telephone company cards, indicating calls to Baltimore from Washington, were marked for identification as Government Exhibits 15 and 16.)

(The two last-marked exhibits having been handed to defense counsel:)

Bernice Gross - Direct Examination

BY MR. LOWTHER:

Q Mrs. Gross, for purposes of my question I want you to assume the following: First of all, in regard to Government Exhibit No. 15 which I am going to hand you in a minute, assume that this telephone company card shows a direct dial, station to station call, from the number National 8-1690, to Idlewood 3-8000--and that was the Hecht Company number?

A Yes, sir.

294 Q --at around 12:26 p.m., and the date was October the 22d, which was a Monday.

And assume that the second card that I am going to show you is an operator card, operator call, and it was from Washington, D. C., National 8-2001, to Idlewood 3-8000, at--I should say, National 8-1690 to Idlewood 3-8000--at about 12:26 p.m. for five minutes, a 55-cent charge--the first one around 11:20 and the second one around 12:26.

THE COURT. What about 16 for identification? What was the date, again?

MR. LOWTHER. The same date, Your Honor, October 22, both calls.

THE COURT. And what was the time?

MR. LOWTHER. The time on 16, Your Honor, was 11:20 a.m., the operator call. The time of the direct dial was 12:26 p.m., for five minutes. That's 15.

Bernice Gross - Direct Examination

BY MR. LOWTHER:

Q Showing you these two numbers, from the National number on Government's 15, National 8-1690, and on the Government's 16 the National 8-2001, can you tell His Honor and the ladies and gentlemen of the jury, looking at those two cards, did you talk with the defendant Laughlin while you were at the Hecht Company on Monday, October 22, 1962?

A Yes, sir.

295 Q And do you today have a present recollection as to what was said by either the defendants Laughlin or yourself, or both of you, in those two calls?

A No, I don't.

Q Can you tell the Court and jury whether or not the calls concerned the old abortion case, Criminal 741-61?

A Yes, sir.

MR. LOWTHER. Will you indulge me one moment, please, Your Honor?

Your Honor, may this card receive a mark at this time, as Government Exhibit 17 for identification, please, sir?

THE COURT. It may be so marked.

MR. LOWTHER. It is a telephone card, Your Honor.

(Telephone company card indicating call to Baltimore from Washington was marked for identification as Government Exhibit No. 17.)

Bernice Gross - Direct Examination

(The last-marked exhibit having been handed to defense counsel:)

BY MR. LOWTHER:

Q Mrs. Gross, I am going to show you this card in a second, and I want you to assume, for purposes of my question, the card being Government's Exhibit No. 17 for identification, that this telephone company toll ticket shows a dialed, direct call from the number National 8-1690, in Washington, D. C., to the number Idlewood 3-8000 in Baltimore, Maryland, at about 3:44 p.m., in the afternoon, for about five minutes' total length, with a charge of 55 cents. Assuming those for the purposes of my question, and looking at this card--

THE COURT. What date?

MR. LOWTHER. Your Honor, the date was October the 26th, a Friday, sir.

BY MR. LOWTHER:

Q With those statements in mind, did you have occasion, on that date, to talk to the defendant Laughlin in the Hecht Company store while you were there?

A Yes, sir.

Q Can you recall at the present day what was said by the defendant Laughlin or by yourself on Friday, October 26th?

A No, sir.

Bernice Gross - Direct Examination

Q Can you tell the Court and jury whether or not the subject-matter of that telephone call concerned the old abortion case, No. 741-61?

MR. LAUGHLIN. Well, Your Honor, that is a leading question. He should ask what it was about. In other words, he is asking something to suggest the answer.

THE COURT. He wants to know whether or not the subject-matter of that conversation--

Mr. O'Neal read the question.

(The last question was read by the reporter.)

297 THE COURT. Now you may answer "Yes," but it still isn't going to help us very much, whether or not yes--yes it did not, or yes it did.

THE WITNESS. It always concerned the abortion case, Your Honor.

MR. LOWTHER. Will you indulge me one moment, please, Your Honor?

May, Your Honor, this item receive a mark as Government's Exhibit No. 18 for identification?

THE COURT. Very well.

MR. LOWTHER. It is a telephone card, Your Honor.

(Telephone card indicating call to Washington from Baltimore was marked for identification as Government's Exhibit No. 18.)

Bernice Gross - Direct Examination

(The last-marked exhibit having been handed to defense counsel:)

BY MR. LOWTHER:

Q Before I show you this card, Mrs. Gross, which now bears the mark as Government's Exhibit No. 18 for identification, can you tell the Court and these ladies and gentlemen of the jury, at any time did you ever--tell us whether or not, I should say--at any time you ever call the defendant Laughlin's office number from Baltimore, the Hecht Company, from a pay station, a phone booth?

A Yes, I did.

298 Q And, first of all, where was the phone booth, if you please?

A On the main floor, which is our second level.

Q In the Hecht Company?

A In the Hecht Company.

Q All right. For purposes of my question at this time I want you to assume the following: That the card I am about to show you, namely, Government's Exhibit 18 for identification, reflects a person to person, collect call, from Idlewood 3 to National 8-2001, the party calling is Mrs. Bernice Gross and the party called is reflected as James Laughlin, and that it also is a day call, charges were accepted, and the call was made with coin from a booth, on the date of October 29th, which was a Monday.

With this card before you, do you have a recollection, did you talk with the defendant Laughlin on that date from the Hecht Company to the National number here in Washington?

Bernice Gross - Direct Examination

A Yes, I did.

Q And now in regard to that date of the 29th day of October of the year 1962, and the date of that letter, November the 13th, the Dr. Goldberg letter, do you have a recollection now as to what that call of October the 29th was about?--as you best recall.

A October the 29th--it might have been about this letter. I don't recall.

299 Q All right. Can you tell the Court and jury, in regard to that call of October 29th, --

MR. LAUGHLIN. Your Honor, based on that answer--"it might have been"--I submit that should go out.

THE COURT. She said she couldn't say whether it had to do with that letter.

BY MR. LOWTHER:

Q Can you inform His Honor and these ladies and gentlemen of the jury, with regard to that date of October 29th, the toll ticket for which you have before you, whether or not the subject-matter of that telephone call with the defendant Laughlin whom you talked with, you say, concerned the old abortion case, Criminal No. 741-61?

A Yes, it concerned the case.

Q Very well. Now, --

Bernice Gross - Direct Examination

MR. LOWTHER. Will you indulge me one moment, please, Your Honor.

Your Honor, at this time, although I don't intend to question this witness concerning these two slips, for purposes of continuity--and I would do it when the case progresses a little bit further--I would ask that they receive a mark, as Government's Exhibit No. 20, with the Court's leave.

THE COURT. What about 19?

MR. LOWTHER. "19" I mean; excuse me, sir.

300

(The two telephone bill slips were marked for identification as Government's Exhibit No. 19.)

THE COURT. Very well; I have seen them.

MR. LOWTHER. I will show them to counsel, please, Your Honor.

THE COURT. Very well.

(The last-marked exhibit having been handed to defense counsel:)

MR. LOWTHER. Will you indulge me a moment, please, Your Honor?

May this, Your Honor, receive a mark as Government Exhibit numbered 20 for identification; and this receive a mark, Your Honor, as Government's 21 for identification, please, sir? They are both phone tickets, Your Honor.

Bernice Gross - Direct Examination

(The two telephone company cards, each indicating a call to Baltimore from Washington, were marked for identification as Government Exhibits 20 and 21.)

(The two last-marked exhibits having been handed to defense counsel:)

BY MR. LOWTHER:

Q Mrs. Gross, I want to show you three phone tickets. The first one you were asked about this morning. I want to show you it, and in addition two others. The first one bears the notation, Government's Exhibit 301 No. 10 for identification, and I want you to assume that it reflects, on a Thursday, November 8, 1962, a person, collect call from yourself to--in the handwriting here--James Laughlin, National 8-2001, at about 12:42 p.m.

I want to show you, in addition, Government's Exhibit numbered 20 for identification and ask you to assume that it represents, on November the 9th, a Friday, a person to person call to Mrs. Gross from National 8-1690, to Forest 7-7440, at about 8:44 a.m., with a charge of 50 cents.

And I want you to assume that the third card I am going to show you is a direct dial card and it shows that on Tuesday, November the 13th, 1962, a call from National 8-1690 to Idlewood 3-8000, Baltimore, at 4:40 p.m., for three minutes or less--the dates being the 8th, 9th and 13th of November.

Bernice Gross - Direct Examination

And with these cards on the stand before you, I want to also direct your attention, if I may, to the date of this letter, November 13, 1962, the Dr. Goldberg letter.

Did you have occasion, on the three dates that the three cards, I have asked you to assume, represent--namely, November 8, November 9 and November 13--have occasion to talk with the defendant Laughlin?

A Yes, sir.

Q And can you tell the Court and jury, on those three dates, 302 namely, November 8, 9 and 13, what the subject-matter of the telephone conversation was, that is, did it concern that letter, that Dr. Goldberg letter?

A It concerned the letter.

MR. LOWTHER. And would Your Honor indulge me again for a moment, please, sir?

THE COURT. Certainly.

BY MR. LOWTHER:

Q Now I want to show you, if I may, Mrs. Gross, --

MR. LOWTHER. And may I have marked, if Your Honor please, first of all, this card as Government Exhibit numbered 22 for identification? It is a telephone card, Your Honor.

(Telephone company card indicating call to Washington from Baltimore was marked for identification as Government Exhibit No. 22.)

Bernice Gross - Direct Examination

(The last-marked exhibit having been handed to defense counsel:)

BY MR. LOWTHER:

Q Mrs. Gross, I want to hand you this card in a second, and before I do, however--and it bears Government Exhibit No. 22 for identification at this time--I want you to assume that this ticket represents a person to person, collect call, from Forest 7-7440--which was what?

A My home.

Q --to National 8-2001, on November the 27th of the year 1962,  
303 at about 9:16 a.m., and that it ran for roughly two minutes and 15 seconds.

With that date in mind, with the date of the November 13 letter of Dr. Goldberg and that card before you, and those assumptions you are being asked to take, can you tell the Court and these ladies and gentlemen of the jury whether or not you talked to defendant Laughlin on November 27th, as that card reflects?

A Yes, sir, I did.

Q And can you tell the Court and jury, in relation to what you testified to this morning, payment for the letter, November 13, whether or not that call had anything to do with that?

A Yes, sir, it did.

Q Very well. Now, --

Bernice Gross - Direct Examination

MR. LOWTHER. And will you indulge me a moment, please, Your Honor?

Your Honor, at this time, with the Court's leave, I would like, for purposes of continuity to have, although I will not ask this witness about these particular notations on this card, I would like to have it marked as Government's Exhibit 23 for identification, please, sir.

THE COURT. It may be so marked.

(Portion of telephone bill was marked for identification as Government's Exhibit No. 23.)

304 (The last-marked exhibit having been handed up and then having been handed to defense counsel:)

MR. LOWTHER. Will you indulge me one moment, please, Your Honor?

Your Honor, may this receive a mark as Government's Exhibit numbered 24 for identification, please?

THE COURT. A telephone card?

MR. LOWTHER. It is, Your Honor--both of them are--

THE COURT. Very well.

MR. LOWTHER. --and 25 for identification, please?

THE COURT. They may be so marked.

(The two telephone company cards, each indicating a call to Washington from Baltimore, were marked for identification as Government Exhibits 24 and 25.)

Bernice Gross - Direct Examination

(The two last-marked exhibits having been handed to defense counsel:)

MR. LAUGHLIN. Your Honor, on this exhibit--apparently it was taken out of the wrong envelope--it shows a call from "Miss Bee"--B double E--to Dr. Forte.

MR. LOWTHER. I will straighten that out in short order, Your Honor.

THE COURT. All right. We will have an understanding, I guess, on that later. I guess it is going to be clarified.

305 MR. LAUGHLIN. Your Honor, this "Miss Bee," could I have the date of that?

THE COURT. The date of the card?

MR. LAUGHLIN. Yes, Your Honor.

MR. LOWTHER. December 18, 1962, Your Honor.

MR. GARBER. Your Honor, what is the date of 25?

MR. LOWTHER. January 7, Your Honor, 1963.

(The two last-marked exhibits having been returned by defense counsel:)

BY MR. LOWTHER:

Q First of all, Mrs. Gross, in regard to a card now bearing the mark Government's Exhibit numbered 24 for identification, I want you to assume, for purposes of my question, that this is a collect call to Taylor

Bernice Gross - Direct Examination

9-3377, in Washington, D. C., from Forest 7-7440, and that it is on December 18, charges were accepted, and that it is, from what appears in the operator's handwriting, to a "Dr. Alan Forte, Georgia Avenue," and the party calling is a "Miss Bee"--capital B-e-e. The question to you first of all is this:

With that assumption in mind, can you tell the Court and these ladies and gentlemen of the jury whether or not you ever had any conversation with the defendant Forte about the use of the phrase or the word, "Miss Bee"?

A Yes, I did.

306 Q I want you to tell His Honor and the jury what those conversations were.

A Mr. Forte didn't want me to use my name when I called him person to person, and he suggested that I use "Miss Bee" and he would know who was calling.

Q All right. Now in regard to that first card, with the calling party being designated as "Miss Bee" and the date the 18th of December, and the number Taylor 9-3377 in Washington, D. C., can you tell the Court and these ladies and gentlemen of the jury, did or did you not have a telephone conversation from Baltimore, Maryland to Washington, D. C. with the defendant Forte on that date, December 18?

A Yes, I did.

Bernice Gross - Direct Examination

Q And can you tell the Court and jury what the subject-matter of the conversation was on that December 18 call?

A To the best of my knowledge, I believe it was for the Christmas present.

Q And when you say that, you refer to what, madam?

A That Mr. Forte was supposed to give me.

Q Now in regard to this other exhibit which I will show you in a second, which bears Government Exhibit number 25 for identification, I want you to assume for purposes of my question that this phone ticket is an operator call; it's collect, charges accepted; the number called is 307 Taylor 9-3377 in Washington, D. C., and it's a call from Baltimore, Maryland; and the number calling is Idlewood 3-8000.

And I want to correct what I said in regard to the other exhibit, 24. I think that will show the "Miss Bee" call was from Idlewood 3-8000.

This card I am showing you now is for January 7th, "Dr. Allan Forte," "Miss Gross;" and then down at the bottom, "Ga"--Georgia Avenue. Can you tell the Court and jury whether or not, on January 7 of the year 1963, you talked with the defendant Forte, as that card reflects?

A Yes, sir, I did.

Q Do you have a recollection as to what the subject-matter of the conversation was with Forte on January 7, 1963?

A No, I don't.

Bernice Gross - Direct Examination

Q All right. Can you tell the Court and jury whether or not it concerned the old abortion case, Criminal--

MR. LAUGHLIN. Of course, Your Honor, I submit that is leading.

MR. LOWTHER. Strike that, if Your Honor please.

THE COURT. She said before, Mr. Laughlin, that every one of her calls pertained to the case, except the ones in February--

MR. LAUGHLIN. Of course, her answer was, Your Honor, that she didn't know what it was.

308 THE COURT. She remembered the essence of the conversation.  
BY MR. LOWTHER.

Q In regard to the date of that call, January 7, 1963--and assume for purposes of my question that Mrs. Jean Smith's youngster was born on January 5, 1963. And assume further, if you will, or rather look at Government's Exhibit No. 8 for identification, this layette slip for the layette for Mrs. Smith's youngster. With those items in mind, do you have a recollection as to the subject-matter of the January 7, 1963 phone call between you and the defendant Forte?

A If I can remember correctly, I told Mr. Forte that Jean had had a little baby girl. And I don't remember about the slip, whether it was before or after that date.

Q All right.

Bernice Gross - Direct Examination

A I just don't remember.

Q And when you say if you remember correctly that you told the defendant Forte that Mrs. Smith had had a youngster, are you referring now to the call, the card for January 7, 1963?

A January 7th.

Q Very well.

MR. LOWTHER. Will you indulge me one moment, please, Your Honor?

THE COURT. Are you going to a new item here, a new card?

309 MR. LOWTHER. I am going to a new card, Your Honor.

THE COURT. Very well. Then we will take a recess.

But let's go back to Government's 24.

MR. LOWTHER. Yes, sir.

THE COURT. I am a little confused. I think you indicated first that it was a Forest number. And then did I understand you later to say you were mistaken?

MR. LOWTHER. Will you indulge me a moment until I look at the card, if Your Honor please?

THE COURT. Yes.

MR. LAUGHLIN. As I have it, Your Honor, it was from a Forest number. That's the way I heard it.

Bernice Gross - Direct Examination

THE COURT. That's the way I had it first; and then I thought that Mr. Lowther changed that, and then started talking about Government's 25.

MR. LOWTHER. Yes, I did; I said it was from a Forest number, Your Honor. And I wish to reserve that until the telephone man is here. It is either from Forest 7-7440; or it's from, from what I have here, a 433 number, which would be--

THE COURT. Well, you have given this witness a hypothetical set of facts, and then asked her certain questions surrounding those facts.

MR. LOWTHER. May I clear that up, during the recess, if Your Honor please?

310 THE COURT. Yes, do that, please, sir.

Ladies and gentlemen, we are going to take a ten-minute recess. You will bear in mind the admonition. You are not to speak to anyone, no one will speak to you, you may not even speak among yourselves about this case. If anyone should attempt to speak to you, you will let me know. You will not read about the case, listen over radio, or TV.

Ten minutes.

(Following the brief recess, the jury being in the box:)

THE COURT. Mrs. Gross, please.

(The witness having returned to the stand:)

THE COURT. You may proceed, Mr. Lowther.

Bernice Gross - Direct Examination

MR. LOWTHER. I find that I was in error, sir.

BY MR. LOWTHER:

Q Mrs. Gross, for purposes of my question in regard to Government Exhibit 24, I want you to assume that it is from a Miss Bee--who was who?

A Myself.

Q --to Dr. Allan Forte, and the number called was Taylor 9-3377; 311 it was a collect, day, coin call--meaning from a pay booth--charges accepted; and the exchange from which it was called was from Baltimore, Maryland; and the central office, that is, the exchange number, was 433, meaning Idlewood 3.

A That's right.

Q Now with that in mind, do you have a recollection on the 18th of December that you had occasion to talk with the defendant Forte from a coin booth, from the exchange Idlewood 3?

A Yes, sir, I do.

THE COURT. That is Idlewood 3-7440?

MR. LOWTHER. Idlewood, Your Honor--433--just Idlewood 3.

THE COURT. I see.

MR. LOWTHER. But on a coin call.

THE COURT. I see.

MR. LOWTHER. Just the exchange.

Bernice Gross - Direct Examination

THE COURT. Idlewood 3--all right.

MR. LOWTHER. Yes, Your Honor.

Now with Your Honor's leave, for purposes of sequence, may this exhibit--I am not going to ask the witness about it--but may it be marked as Government Exhibit 26, if you please, sir?

THE COURT. Very well. It may be so marked.

(Portion of telephone bill was marked for identification as Government Exhibit No. 26.)

312 MR. LOWTHER. And this, if Your Honor please--although I am not going to ask the witness about it--as Government Exhibit numbered 27, please, sir.

THE COURT. Very well.

(Another portion of a telephone bill was marked for identification as Government Exhibit 27.)

THE COURT. Very well. I have seen them both.

(The two last-marked exhibits having been handed to defense counsel and returned.)

MR. LOWTHER. May this card receive a mark, Your Honor, as Government Exhibit numbered 28, please, sir?

THE COURT. Very well; it may be so marked.

MR. LOWTHER. It is a telephone card.

(Telephone company card indicating call to Baltimore from Washington is marked for identification as Government Exhibit No. 28.)

Bernice Gross - Direct Examination

(The last-marked exhibit having been handed to defense counsel and returned:)

BY MR. LOWTHER:

Q Mrs. Gross, I want you to assume for purposes of this question that this card which I am about to show you, which bears Government Exhibit number 28 for identification, reflects, on Friday, January 18, 1963, a person to person call, to a Miss Gross, from National 8-1690 to Idlewood 3-8000 in Baltimore, Maryland, National being in Washington, at about 313 12:11 p.m., for four minutes, with a charge of about 60 cents. And when I am showing you this toll ticket, I am showing you also Government's Exhibit numbered 4 for identification, this letter dated January the 20th, 1963, the joint letter of Jean Smith and her husband.

In regard to the date of the toll ticket, January 18, 1963, person to person, to you from National 8-1690, did you have occasion on that date to talk to the defendant Laughlin?

A Yes, sir, I did.

Q And in regard to that date, that call, can you tell the Court and these ladies and gentlemen of the jury, and directing your attention now to the date of the letter of January 20, 1963, the joint letter, what was the subject-matter of the call from the defendant Laughlin to you on January the 18th, 1963?

Bernice Gross - Direct Examination

A It was this letter. Mrs. Smith had called me and told me she didn't know how to word it. And I called Mr. Laughlin.

MR. LOWTHER. Will you indulge me a moment, please, Your Honor?

THE COURT. Are you going to another card?

What did you say with respect to that, Mrs. Gross? You said that Mrs. Smith called you and said she didn't know how to word the letter. You said you then called Mr. Laughlin?

314 THE WITNESS: I called Mr. Laughlin--

MR. LAUGHLIN. Excuse me, Your Honor. I didn't get Your Honor's question.

THE COURT. I asked her if she said that she then called Mr. Laughlin.

I think you were asked to assume that the call was to you, from National--what is it? 8-1690?

MR. LAUGHLIN. 8-1690, yes, Your Honor.

THE COURT. National 8-1690. Now does that help you at all?

THE WITNESS. I thought Mr. Lowther said that it came from my home.

THE COURT. Mr. Lowther, will you please give her the hypothetical.

MR. LOWTHER. I will, Your Honor.

Bernice Gross - Direct Examination

BY MR. LOWTHER:

Q I want you to keep in mind, Mrs. Gross, as I ask you this question, that this telephone card, assume, shows a person to person call to you, --

A To me.

Q --at Idlewood 3-8000 from National 8-1690.

A I see.

Q And I want you further to recall the date of that letter, January 20, two days after the date of this call.

315 Now my question to you is, can you tell the Court and these ladies and gentlemen of the jury, on Friday, January the 18th, before the date of the joint letter, did you talk with the defendant Laughlin, --

A Yes.

Q --as that toll ticket reflects?

A Yes, I did.

Q And what was the subject of the conversation on that date?

A It had to do with the letter.

Q And when you say it had to do with the letter, the letter being January 20, 1963, can you tell the Court and jury the substance of the conversation?

A I don't remember it too well. But Mr. Laughlin had asked me if Mrs. Smith had sent the letter. It had to do with the letter; but what the conversation was exactly, I couldn't say.

Bernice Gross - Direct Examination

Q Very well. Now, --

MR. LOWTHER. Will you indulge me a moment, please, Your Honor?

Your Honor, while I don't intend to question the witness on this particular document, for purposes of sequence may it be marked as Government Exhibit 29, please, sir?

THE COURT. Yes, sir.

316

(Telephone company card indicating call to Washington, D. C., was marked for identification as Government Exhibit No. 29.)

THE COURT. I have seen the exhibit.

(The last-marked exhibit having been handed to defense counsel and returned:)

MR. LOWTHER. May this, Your Honor, receive a mark as Government's Exhibit 30 for identification, if you please?

THE COURT. It may be so marked.

MR. LOWTHER. It is a telephone card, Your Honor.

(The telephone company card was marked for identification as Government Exhibit No. 30.)

(The last-marked exhibit having been handed to defense counsel and returned:)

Bernice Gross - Direct Examination

BY MR. LOWTHER:

Q Mrs. Gross, for purposes of this question I want you to assume the following, that this telephone ticket which I am about to show you reflects a telephone call, person to person, to you, from the number National 8-1690 in Washington, to Forest 7-7440 --which was what number?

A My home.

Q --and on February 7th, a Thursday, at about 5:48 p.m., a person to person call, and it lasted for about approximately five minutes, with a charge of 70 cents.

317 With this card before you, and with the date in mind of February 11, the date that the criminal case 741-61 was first called for trial, and the date February 12, 1963, the dates of the beginning of the trial of Criminal 741-61, with those dates in mind and with that card before you, did you have occasion on February the 7th, 1963 to talk to the defendant Laughlin?

A Yes, I did.

Q Do you have a recollection as of the present time, Mrs. Gross, with the trial dates in mind, first of all, do you have a recollection as to the subject-matter of the conversation of February the 7th?

A To the best of my recollection, it was the forthcoming trial, the abortion trial.

Q And do you recall any of the subject-matter of the call, outside of the fact that it had to do with the forthcoming abortion trial?

Bernice Gross - Direct Examination

A No, sir, I don't.

Q Very well. And--

MR. LOWTHER. With Your Honor's leave, will you indulge me, please, sir?

May this, Your Honor, receive a mark as Government's Exhibit numbered 31 for identification?

THE COURT. It may be so marked.

MR. LOWTHER. It is a telephone card, Your Honor.

318

(Telephone company card indicating a call to Baltimore from Washington was marked for identification as Government Exhibit No. 31.)

(The last-marked exhibit having been handed to defense counsel:)

MR. LOWTHER. And may this, Your Honor, receive a mark as Government's Exhibit 32 for identification, please, sir?

THE COURT. It may be so marked.

MR. LOWTHER. A telephone card, Your Honor.

(Telephone card indicating call to Baltimore from Washington was marked for identification as Government Exhibit No. 32.)

(The two last-mentioned exhibits having been handed to defense counsel and returned:)

BY MR. LOWTHER:

Bernice Gross - Direct Examination

Q Mrs. Gross, first of all let me ask you to assume the following, that this toll ticket, Government's Exhibit 31 for identification, shows that on February the 12th, the day that the old abortion case came on for trial and a jury was picked--assume that--that at 7:52 in the morning this toll ticket shows a direct-dial call--and, incidentally, were you working at Hechts in February of 1963?

A I believe I was laid off for a month at that time.

Q All right--that this shows, the first toll ticket, at 7:52 a.m., 319 a direct-dial call, from Emerson 2-1776, in Washington, D. C., to Forest 7-7440, for about three minutes. And the second ticket, being Government's Exhibit 32 for identification, shows, on the same date, February 12th, at about 4:45 p.m. in the afternoon, a dial from Washington, National 8-1690, to Forest 7-7440--as I say, about 4:45 p.m.--for about seven minutes that afternoon.

With those assumptions in mind, assuming them to be true, did you have occasion on February the 12th, the day 741-61 came on for trial, to talk to the defendant Laughlin in the morning, at home, and in the afternoon, at home, in Baltimore?

A Yes, sir, I did.

Q Can you tell the Court and jury what the subject-matter of the conversations was, having in mind that that was the date that the jury was picked in Criminal No. 741-61?

Bernice Gross - Direct Examination

A No, I couldn't tell you, Mr. Lowther.

Q Can you tell the Court and jury whether or not you have a recollection that the phone conversations of February 12th had anything to do with the trial of 741-61?

A Oh yes, sir, it had to do with the trial.

Q You can remember nothing more specific than that?

A On one of those, at the beginning of the trial, Jean Smith didn't show up one day.

Q Let me ask you this. Assume this, if you will, please, --  
320 MR. LOWTHER. And, Your Honor, this assumption, I assure the Court, is based upon--

MR. LAUGHLIN. Your Honor, I think we had better come to the bench.

THE COURT. Very well. Come to the bench.

(At the bench:)

MR. LOWTHER. I want to advise Your Honor that what I am asking this witness to assume is a fact to be brought out through another witness, that the jury was impaneled on February the 12th, and there was a heavy snow storm that day, and Jean Smith did not get here from Baltimore until after Judge Tamm recessed the case, with a motion to dismiss the indictment by Mr. Laughlin for the defendant Forte, which was taken under advisement. Jean Smith did get here late. And I will assure Your Honor I will put those facts in evidence through another witness.

Bernice Gross - Direct Examination

THE COURT. Very well.

MR. LAUGHLIN. Your Honor, I think it ought to come in in the right way. I don't think you can do it in that fashion, on this assumption. I think he can offer that through witnesses in the regular way.

THE COURT. He can't be putting witnesses on and off here at will. He had made representation he will make proof of this, the hypothetical, and with the assurance he is going to bring the proof on. 321 We can't be pulling these witnesses on and off the stand.

MR. LAUGHLIN. That's true, Your Honor; but--

THE COURT. I think what you are really talking about now is procedure, rather than evidence. And I think it is procedure certainly within the discretion of the Court to allow. Therefore I am going to allow it, with the representation that he will prove, as I understand, that on February 12 Jean Smith did not get here at the time the jury was selected and sworn; that you, Mr. Laughlin, on behalf of Mr. Forte, moved to dismiss the indictment; that Judge Tamm took the motion under advisement; that she got here late that afternoon, or late in the day--at some time, in any event.

Is that the essence of it?

MR. LOWTHER. That is the essence of it, Your Honor.

THE COURT. You may ask it.

(In open court:)

Bernice Gross - Direct Examination

MR. LOWTHER. With Your Honor's leave, may I have the file in 741-61, please?

THE COURT. Yes.

MR. LOWTHER. Thank you (receiving file from the Deputy Clerk).

BY MR. LOWTHER:

Q I want you to have this in mind in regard to my questions concerning these two phone calls, one in the A.M., 7:52, to your home, from Emerson 2-1776, and one in the P.M., 4:45 p.m., to your home, Mrs. Gross, from National 8-1690:

I want you to assume that on February the 12th, 1963, the self same date of these calls, that a jury was impaneled in the old abortion case, and that on that date there was a very, very heavy snow storm, and that Mrs. Jean Smith did not arrive over here in Washington, D. C. until the trial, that is, the jury had been excused for the day, on February the 12th, and that she didn't testify in the trial.

Assuming those things to be true, do you have a recollection now as to the subject-matter of either the morning call, at 7:52 a.m., for about three minutes or less, or the afternoon call at 4:45 p.m. for seven minutes?

A No, I don't. I don't recall.

Bernice Gross - Direct Examination

Q Can you tell the Court and the jury whether or not either of the calls, from the Emerson number in the morning and from the National number in the afternoon, to you had anything to do with the whereabouts or the availability of the witness Jean Smith?

MR. LAUGHLIN. Of course, Your Honor, I object to this as leading.

THE COURT. I will grant it. He just asked whether she can testify whether or not the conversation had anything to do with--

323 THE WITNESS. I--I'm sorry.

THE COURT. You don't have to testify.

THE WITNESS. No. I believe I testified before that I thought it was because Jean Smith hadn't shown up. And there was a snow storm.

BY MR. LOWTHER:

Q Very well. Now, --

MR. LOWTHER. Will you indulge me one moment, please, Your Honor?

May this, Your Honor, receive a mark as Government Exhibit numbered 33 for identification? It is a phone ticket, Your Honor.

THE COURT. Very well.

(Telephone company card indicating call to Baltimore from Washington was marked for identification as Government Exhibit No. 33.)

Bernice Gross - Direct Examination

(The last-marked exhibit having been handed to defense counsel:)

BY MR. LOWTHER:

Q This ticket, assume for the purposes of my question, Mrs. Gross--which is Government Exhibit 33--reflects a telephone call on February 13th, 1963, a Wednesday, at the hour of about 1:05, just a little after one in the afternoon; it was a dial call, from National 8-1690 in Washington to your home number, Forest 7-7440, for about six minutes, and the charge 324 was roughly 65 cents.

First of all, in regard to this toll ticket, did you on February 13th have occasion to talk with the defendant Laughlin on that date?

A Yes, I did.

Q And I want you to assume further, for the purposes of my question, that on February 13th testimony was begun, for the first time, in Criminal No. 741-61, the old abortion case.

Do you recall what the subject-matter of your phone conversation with defendant Laughlin was on February 13th?

A Mr. Laughlin was keeping me advised as to how the trial was going. That was all.

Q Now, did there come a time during the course of the trial when you had occasion to hear--and I am talking now of the period of time from February 12, 1963 to February 20, 1963, the date of the verdict in the old abortion case--did there come a time during that period of time when you had occasion, Mrs. Gross, to hear from the defendant Forte?

Bernice Gross - Direct Examination

A Yes, I did.

Q And was it face to face, or by telephone?

A By telephone.

Q And would you tell His Honor and these ladies and gentlemen of the jury, where were you when you got the call from the defendant Forte?

325 A I was at home.

Q And what if anything did Forte say to you over the phone in this call during the course of the abortion trial?

A He told me that I might never see him again; that things were going very badly; that Jean Smith had double-crossed him and had double-crossed me. And he told me to keep my doors closed--"Don't answer the door. Don't answer the phone. Jean Smith told everything."

\* \* \*

333 THE COURT. What other material do you have, sir, for cross-examination purposes?

MR. LAUGHLIN. We have the various grand jury testimony.

334 MR. LOWTHER. And they have had them for--

THE COURT. Wait just a minute.

But you have had that for some time.

MR. LAUGHLIN. Yes, we have had it.

\* \* \*

Mr. Miller - Direct Examination

349 THE COURT. Do you have something, Mr. Lowther?

MR. LOWTHER. I do, if Your Honor pleases. Your Honor, yesterday I believe it was, instructed me that no examination was to be made of Mrs. Gross concerning the contents of the four taped phone calls of March 1, March 13 and March 18, 1964, until I proffered authority to Your Honor.

THE COURT. Yes.

MR. LOWTHER. Obviously we start out with the proposition that the tapes themselves, the playing of them is permissive under decision of the appellate court in this circuit. The question then becomes whether or not Bernice Gross may refresh her recollection as to those four calls from the transcript of the calls themselves, which have been transcribed in the trial before Judge Hart, and I think also in the trial before Judge Youngdahl. I want to proffer to Your Honor two cases and discuss a third, if I may; and I would like to give the citations first.

\* \* \*

360 (While counsel are being heard:)

MR. LOWTHER. Your Honor, can I interrupt?

THE COURT. Yes.

MR. LOWTHER. It has become moot. I have just gotten a message.

MR. LAUGHLIN. I didn't hear.

Mrs. Gross - Direct Examination

THE COURT. He isn't going to pursue it.

Very well. Now we bring in the jury, gentlemen?

\* \* \*

361 THE COURT. Good morning, ladies and gentlemen.

Let us get Mrs. Gross back, please. You may proceed.

MR. LOWTHER. Your Honor, may this document receive a mark, please, as Government Exhibit numbered 34 for identification?

THE COURT. It may be so marked.

MR. LOWTHER. It is a telephone card, Your Honor.

(The telephone company call card  
was marked for identification as  
Government Exhibit No. 34.)

(The last-marked exhibit having been handed to defense  
counsel, and returned:)

Thereupon

BERNICE GROSS,

having returned to the stand, was examined and testified further as follows:

DIRECT EXAMINATION  
(RESUMED)

BY MR. LOWTHER:

Q Mrs. Gross, for purposes of the question, before I show you this card, I want you to assume that this card reflects a person to person call from the number Forest 7-7440--which was whose number?

Bernice Gross - Direct Examination

A My home.

362 Q --and the number to which the call was made was National 8-2001; that the call occurred at approximately 8:15 p.m. in the evening hours of Wednesday, February the 27th, 1963; it lasted for about eight minutes, and the charge was about a dollar.

THE COURT. You had better come to the bench, gentlemen.

(At the bench:)

THE COURT. Did you say February 27th?

MR. LOWTHER. I did, Your Honor. I have one for the 27th, and the next one was the 28th.

THE COURT. I thought the conspiracy ended on the 20th. Did this go to the substantive count?

MR. LOWTHER. No; it goes to the defendant Laughlin only. If Your Honor sees fit, I might inform the Court what the testimony will be, that I expect Mrs. Gross to say that she called the defendant Laughlin and said she had been subpoenaed before a grand jury over here; that she was asked did she have a subpoena, and she said no; and she was informed she did not have to come.

And on one of the other of the calls she was told by the defendant Laughlin, before she went before the grand jury, "You don't know anything. You don't know anything."

MR. LAUGHLIN. Of course we object.

Bernice Gross - Direct Examination

363 THE COURT. I don't see how that could possibly go to the conspiracy. How could it go to the conspiracy?

MR. LOWTHER. Well, if the Court pleases, as I view it, although the conspiracy is ended, one of the conspirators, upon being called by this witness here and told there was a grand jury, said "You don't know anything. You don't know anything." It evidences knowledge on his part of the conspiracy and his participation therein, and also an effort on his part to convey to this witness that she not say anything before the grand jury.

THE COURT. That certainly wouldn't go against the co-defendant.

MR. LOWTHER. No, it would not, sir.

THE COURT. It would not go against him.

It couldn't go to the substantive count, except as evidence to show that that was the significance and meaning of what had been going on before.

MR. LOWTHER. Correct.

THE COURT. I am going to take this testimony out of the presence of the jury.

MR. LOWTHER. Very well.

THE COURT. And then we can give it due consideration. I think it is pretty important.

MR. LOWTHER. Very well, sir.

Bernice Gross - Direct Examination

(In open court:)

364 THE COURT. Ladies and gentlemen of the jury, I have a matter that may take a little time, and it is easier for me to deal with counsel if you will go to the jury room, please.

(The jury left the courtroom.)

THE WITNESS. Shall I leave here, Your Honor?

THE COURT. No; you stay, please.

Now you may proceed and take this testimony out of the presence of the jury.

MR. LOWTHER. Your Honor, in order to shorten it, may this card receive a mark, please, as Government Exhibit No. 35? It is a telephone card, Your Honor.

THE COURT. Very well.

(Telephone company call card was marked for identification as Government Exhibit No. 35.)

(The last-marked exhibit having been handed to defense counsel, and returned:)

MR. LOWTHER. And for the benefit of the parties, Your Honor, I will say right now that the last card I have handed them, Government's Exhibit 35 for identification, is a telephone company card which reflects a dial call, station to station, from National 8-1690 to Forest 7-7440, at 6:24 p.m., for about four minutes, a 45-cent charge, on

Bernice Gross - Direct Examination

February the 28th, a Thursday, the day before a grand jury convened in Washington, D. C. on March 1.

365 THE COURT. I think we can just tell the witness she can assume those to be the facts of this Government Exhibit 35.

MR. LOWTHER. Yes.

THE COURT. You understand?

THE WITNESS. Yes, sir.

BY MR. LOWTHER:

Q First of all, Mrs. Gross, let me get back, if I may, to the Exhibit 34. And I want you to assume, before I ask you this question, that Government's 34 reflects a person to person call from Forest 7-7440, your home phone number, to National 8-2001; and it reflects that the party called was --the handwriting is just the name--"Laughlin," and it was around 8:15 p.m., it lasted for eight minutes, and the charge therefor was a dollar. It was a night call, person to person, as I said.

I want you to bear in mind, also--but, first of all, did you appear before a grand jury over here on Monday, March 1st of the year 1964?

A Yes, I did.

Q Now with that in mind, and having in mind also that Government's 35 reflects another call the day following 34, on February 28th, from National 8-1690 to Forest 7-7440, at 6:24 p.m., did you have occasion on the 27th of February, two days before the grand jury convened, to talk with defendant Laughlin on the phone while you were at home?

366

Bernice Gross - Direct Examination

A Yes, I did.

Q And at that time can you tell the Court whether or not you had received any information that you were to be a witness before the grand jury?

A I believe I did.

Q All right. Now will you tell His Honor what the subject-matter, what the substance of the conversation, of the telephone call between you and defendant Laughlin, the eight-minute call on February the 27th, in the evening hours, was.

A To the best of my recollection, I was very angry at the fact that I had to go to the grand jury. I thought at the time it was because of Sam Wallace--Sergeant Sam Wallace--and I was angry at Mr. Laughlin for bringing all that out at the abortion trial.

I hadn't received a subpoena at the time; and Mr. Laughlin told me that so long as I hadn't received a subpoena, I didn't have to go to the grand jury, and I had nothing to worry about. According to him, I had nothing to worry about.

Q All right. And in the call of February 28th, in the evening hours, did you talk with the defendant Laughlin then?

A Yes, I did.

367 Q And can you tell the Court what the substance of the conversation on that occasion was?

Bernice Gross - Direct Examination

A It was the same thing.

Q Did there come a time in either of the conversations, on February 27th or February the 28th, when you had occasion to receive any information or instructions from the defendant Laughlin as to your appearance before the grand jury?

A He said, he told me, that without a subpoena I didn't have to go, and had nothing to worry about--"Don't worry about anything."

Q And let me ask you this question, with the Court's leave.

MR. LAUGHLIN. Your Honor, I object to any leading questions. I think that the witness should be--

THE COURT. Let's hear the question, Mr. Laughlin. I haven't any idea what the question is going to be.

MR. LAUGHLIN. Of course the only trouble is, Your Honor, with a leading question, --

THE COURT. Sir, I can't read his mind. If you can, you have greater powers than I have.

MR. LAUGHLIN. Very well.

THE COURT. Go ahead and ask the question.

BY MR. LOWTHER:

Q Can you tell His Honor, in either of these conversations, Mrs.  
368 Gross, whether or not the defendant Laughlin used the phrase to you, "You don't know anything. You don't know anything."

Bernice Gross - Direct Examination

MR. LAUGHLIN. Of course I object to that, Your Honor.

THE COURT. I am going to overrule it, for the purpose of this examination. It may be a different thing, if it is brought up before the jury. If it is, you may renew your objection then.

Go ahead and answer the question.

BY MR. LOWTHER:

Q And your answer, madam?

A Yes, sir; yes, he said that.

MR. LOWTHER. Very well; that's all I have, Your Honor,  
on this

CROSS EXAMINATION

BY MR. LAUGHLIN:

Q Mrs. Gross, you say that when you got the word to come over, you thought it was about Sam Wallace?

A That's right.

Q You knew him for some time, had you not?

A Yes, I knew Sam.

Q You had worked with him and you called him "Sam"?

A No. At that time I knew him as Sergeant Wallace. I had met him one time.

369 Q Why was it you thought it was involving Wallace?

A That's what was told to me.

Bernice Gross - Cross Examination

Q By whom?

A Sergeant Diven had told me there was an investigation by the grand jury of Detective Wallace--or Sam Wallace.

Q About what?

A I didn't know. All I knew was it wasn't concerning me, I thought.

Q Is it your testimony, Mrs. Gross, that you did not have the slightest idea what it was involving Sam Wallace?

A Not other than what you had brought out at the abortion trial.

Q What had I brought out?

A That he was bribing Mr. Forte.

Q And then Sergeant Diven had told you that?

A No. He told me that the grand jury was having an investigation concerning Sergeant Wallace. And that's all he told me--and I would have to appear.

Q At that time how did you know what had been brought out at the abortion trial?

A Sergeant Diven had told me. And I believe you did, too. You called me and told me.

Q When was that?

A I don't remember the dates.

370 Q Now it is your testimony, then, that you thought this involved Sam Wallace?

Bernice Gross - Cross Examination

A Yes, sir.

Q And it involved a possible bribe?

A Yes, sir.

Q That he had been trying to bribe Forte?

A I don't know about that. But that is what I had heard.

Q And in this phone conversation did you go into that with--you say you called me--did you go into that with me?

A Yes, I did.

Q About the shakedown and what it was?

A No. I just said, "On account of you using Sergeant Wallace, I have to go to Washington to the grand jury."

Q Did you use those words, "On account of you using Sam Wallace"? Did you say that?

A Mr. Laughlin, two years ago, I don't remember my exact words.

Q I am asking you now. You have testified just a few minutes ago that it involved--you thought it involved--Sam Wallace.

A That's what I thought.

Q You remember that?

371 A I was told by Mr. Sullivan, too, that it involved Sergeant Wallace.

Q When had you been told by him?

A It must have been a day or two before I was to appear.

Bernice Gross - Cross Examination

Q And when was the first time, then, having in mind you have testified that this call was the 27th of February? Is that right?

A According to the telephone card.

Q What was it, the 27th or 28th?

A According to whatever the card said. I can't remember.

Q You don't have any independent recollection?

A No; it was two years ago.

Q Anyway, it was before that date that Sullivan had told you about the Sergeant Wallace matter; is that right?

A Before what date?

Q Before the date of this call.

A Before the date of my appearance in the grand jury?

Q No. Before the time of the call that you made, that you say you made, had you before that time talked to Sullivan?

A No. Sergeant Diven was the first one to tell me. Then I called you.

Q Then, as I understand, it wasn't until you got here, is that it, that Sullivan told you about Wallace? Is that it?

372 A No. No. I had called him on the phone and told him I didn't have a subpoena, and I asked him what this was about. That must have been the 28th, the evening of the 28th. I'm not sure of the dates.

Q Where did you call him?

Bernice Gross - Cross Examination

A I don't know if I reached him here or at his home. I'm not sure.

Q Was it a collect call?

A No; I paid for that one.

Q And can you tell us the time of day or night of that call?

A I certainly couldn't.

MR. LAUGHLIN. I have nothing else, Your Honor.

THE COURT. Mr. Garber?

MR. GARBER. Nothing, Your Honor.

THE COURT. Mr. Lowther, do you have anything further?

MR. LOWTHER. No, Your Honor.

THE COURT. My problem with this, Mr. Lowther, frankly, in the first place of course it would not be admissible as to the defendant Forte, either as to the conspiracy count or the substantive count.

Do counsel desire the witness to step out into the corridor?

Do you desire to have the witness step out into the corridor, gentlemen?

373 MR. LAUGHLIN. Yes, sir.

MR. GARBER. Yes, Your Honor.

THE COURT. Mrs. Gross, if you will please step out, and don't go far. We will have you back in a minute.

(The witness left the courtroom.)

Discussion

MR. LOWTHER. Your Honor, would you hear for just a moment from me, please, sir?

THE COURT. Yes.

MR. LOWTHER. I think I see the problem that confronts the Court in regard to these last two calls. And I say, out of an abundance of caution, that I will not question the witness about them.

THE COURT. I think that is a proper procedure to take. I think it can be a close question; but I'm not sure it has an awful lot of substance to it, even if it were received.

\* \* \*

388 THE COURT. I think, gentlemen, while we are talking about the scope of cross-examination, we have another problem here, and that is what is impeachable evidence.

As I understand, we are going to soon have the cross-examination begin. I am going to have marked as a Court's document for this record what I understand has been given to defense counsel during the prior trial, the minutes of Bernice Gross' testimony before the grand jury on March 1, 1963, which I understand was her first appearance.

MR. LAUGHLIN. Your Honor, excuse me. Pages 1 to 11; am I right?

THE COURT. Yes, it is; you are right.

Discussion

389           That will be Court's document No. 1, in the record.

(The grand jury testimony of Bernice Gross, March 1, 1963, pages 1 to 11, is accordingly identified as Court's Document No. 1.)

THE COURT. Then we will also have in the record Jean Smith's March 1, 1963 testimony before the grand jury, which I believe is some 18 pages. And that will be Court's document No. 2 in the record.

(The grand jury testimony of Jean Smith, March 1, 1963 is accordingly identified as Court's Document No. 2.)

THE COURT. Then Bernice Gross' second appearance before the grand jury, on March 1, 1963, which consists of seven pages, Court's document No. 3 in the record.

(The grand jury testimony of Bernice Gross, second appearance on March 1, 1963, is accordingly identified as Court's Document No. 3.)

MR. LAUGHLIN. Hasn't Your Honor missed something between the two?

THE COURT. I am going to get to that now, sir.

Court's document No. 4 is the interrogation of Mrs. Bernice Gross in room 3439 United States Attorney's Office, United States Court-house, Washington, D. C., Friday, March 1, 1963. Present were Mr. Sullivan, Mr. Hannon, and for part of it Mrs. Jean T. Smith and, of course, Mrs. Gross.

Discussion

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(The interrogation of Bernice Gross in the United States Attorney's Office, March 1, 1963, is accordingly identified as Court's Document No. 4.)

THE COURT. Then I believe there is the testimony of Bernice Gross before the grand jury on March 18, 1963, commencing on page 91 of the transcript and continuing through to and including page 174 of the transcript. I might say what I have is simply those excerpted pages. That is Court's Document 5 in the record.

(The grand jury testimony of Bernice Gross on March 18, 1963 is accordingly identified as Court's Document No. 5.)

THE COURT. Then the testimony of Bernice Gross before the grand jury, re possible violations of 18 U. S. C. Section 1621. Do defense counsel have this?

MR. LAUGHLIN. Yes, Your Honor.

MR. LOWTHER. Yes, Your Honor.

THE COURT. This was before the grand jury on Tuesday, March 19th, 1964, and it is from page 3, and the testimony is through page 62--Court's Document No. 6.

(The grand jury testimony of Bernice Gross, March 19, 1964, is accordingly identified as Court's Document No. 6.)

THE COURT. Now is there anything else, Mr. Lowther,  
391 that the defense have been furnished, so far as Jencks or the grand jury is concerned?

Discussion

MR. LOWTHER. Will you indulge me a moment, please, sir?

THE COURT. Yes.

MR. LOWTHER. And you are not limiting your question, Your Honor, I take it, to Mrs. Gross alone?

THE COURT. Well I was at this time. But what else do you have, sir? What I am visualizing is the cross-examination now of Mrs. Gross. But if you have anything else, you might as well get it in the record and everybody will know what it is.

MR. LOWTHER. They have heretofore been furnished testimony of Sergeant Wallace of March 1, 1963; the testimony of Captain Daly on the same date; of Officer Stanzak, Officer Moriority, Officer Lorraine Burrell, Officer Crispin Preston.

THE COURT. All the same date?

MR. LOWTHER. Yes, sir.

They have been furnished heretofore the testimony of Robert Hill, in another case; Sergeant Eiffel Diven, of the Baltimore City Police Department.

THE COURT. Still March 1, Mr. Lowther?

MR. LOWTHER. Your Honor, I can't give you the date actually right now of her appearance.

THE COURT. Grand jury testimony?

MR. LOWTHER. Grand jury testimony, sir.

Discussion

The testimony of Mrs. Gross, as Your Honor has recounted; the second appearance of Sergeant Diven; the testimony of an individual named Theodore R. Hagens, Jr., in the Joyce Johnson case; the second testimony of Robert Hill in the Joyce Johnson case; the testimony of a Leroy Johnson before the grand jury--this is all grand jury--the testimony of Jean Smith.

THE COURT. Is that the same testimony, March 1, 1963?

MR. LOWTHER. It is, sir, yes, Your Honor.

The testimony of the defendant Laughlin; the testimony of the defendant Forte.

THE COURT. Before the grand jury, both Laughlin and Forte?

MR. LOWTHER. Yes, Your Honor.

The--well, again, it's Mrs. Gross.

Another appearance of Sergeant Wallace before the grand jury--and I can't give you the date, sir.

And a final appearance of Sergeant Wallace before the grand jury.

They have heretofore been furnished all of those.

THE COURT. Mr. Laughlin, you acknowledge receipt of all of those?

393

MR. LAUGHLIN. I agree, Your Honor.

THE COURT. And you, Mr. Garber?

Discussion

MR. GARBER. Yes, sir.

THE COURT. I think, so far as the cross-examination of Mrs. Gross is concerned, then, we have now in the record, as Court documents, everything that would pertain to her cross-examination. Certainly there would be, I would assume, nothing in the testimony of any of the other people mentioned before the grand jury that could be used for impeachment purposes with Mrs. Gross. Isn't that right?

MR. LAUGHLIN. I can think of none now, Your Honor.

THE COURT. All right. I am going to leave those documents in the record as the Court's documents, as I have indicated. And I will now take a recess.

\* \* \*

Bernice Gross - Direct Examination

402

DIRECT EXAMINATION  
(RESUMED)

BY MR. LOWTHER:

Q Mrs. Gross, I want to direct your attention, if I may, to Government's Exhibit numbered 5 for identification, which is a call of-- I will show it to you--which shows a call on December 1, 1962, person to person, collect, from Mrs. Bernice Gross to Dr. Allan Forte--Government's 5. I want to show you this on the stand, this card (handing). You  
403 have already said you talked to the defendant Forte on that date about the hundred dollars for yourself for Christmas.

In that call, Government's 5 for identification, that card that you have, person to person, collect, from you to the defendant Forte at Taylor 9-3377, would you tell the Court and these ladies and gentlemen of the jury when you made that person to person call, and looking at the card, what you told the operator and what if anything you heard the operator tell the defendant Forte--charges accepted and so forth. Tell the Court and jury in that regard, please.

MR. GARBER. Your Honor, I am going to object to anything the operator may have said.

THE COURT. Come to the bench, gentlemen.

(At the bench:)

Bernice Gross - Direct Examination

THE COURT. Do I understand that this conversation the operator had with the defendant Forte was heard by this witness?

MR. LOWTHER. Your Honor, to make it clear to her, that is the way my question should have been worded.

THE COURT. But I think you indicated to her at first, or at least as I got it, you first said what did she say to the operator, and then what did the operator say to Forte.

404 MR. LOWTHER. I think it is admissible, if Your Honor pleases.

THE COURT. She is a co-conspirator.

MR. GARBER. That may be so, Your Honor. But I think what the operator may have said, I think that wouldn't be admissible. She is a third person.

THE COURT. If the third person was talking to the defendant Forte, in the presence of the co-conspirator--and I am assuming that Forte was supposed to have said something to the operator.

MR. LOWTHER. That is my understanding, Your Honor.

THE COURT. Why don't you put it this way, "What conversation did you hear between the operator and Forte?"

MR. LOWTHER. Very well.

THE COURT. And if there was a conversation and she heard it, and Forte was in it, I don't see why that is not admissible.

Bernice Gross - Direct Examination

MR. GARBER. Well, in essence, I still submit it would be hearsay, her testimony as to what a third person said, even if it was in the presence of the defendant.

THE COURT. Suppose that Forte and the operator and this witness, a co-conspirator unindicted, were sitting in the same room and she heard the operator say to Forte, "Why did you do that?" And he said, "Well, I didn't want the case to come to trial." Couldn't she repeat that conversation?

405 MR. GARBER. As I understand Mr. Lowther's question, he is asking her what the operator said.

THE COURT. To Forte, in her hearing.

Make a proffer, Mr. Lowther.

MR. LOWTHER. I expect, Your Honor, the witness to say that on these person to person, collect calls from her to Forte, and from her, Mrs. Gross, to the defendant Laughlin, that Mrs. Gross would say either "Mrs. Bernice Gross," or "Bernice Gross," or "Mrs. Gross," as the card will reflect, "collect call, person to person," "collect to Dr. Forte," or "Dr. Allan Forte," whatever the card reflects. And the operator, with that information, would ring the number and would say that so and so was calling Dr. Allan Forte or James Laughlin or Mr. Laughlin, and will they accept charges from a Mrs. Bernice Gross or Bernice Gross; and that the party called would come on the line and,

Bernice Gross - Direct Examination

after being given that information, would say yes they will accept the charges; and the conversation went on.

THE COURT. And the question was put to Forte, "Will you accept the charges on a call from Bernice Gross," within the hearing of Bernice Gross?

MR. LOWTHER. Yes, sir. That's my proffer, Your Honor.

406 THE COURT. And Bernice Gross heard Forte then say, "Yes, I will accept the charges." Is that it?

MR. LOWTHER. That is right. In other words, similarly, Your Honor, for example, if I were to call home from fishing or something like that, and I use a coin in a pay station and say, "This is Joseph A. Lowther. I'm calling such and such a number, to Mrs. Lowther, person to person, collect." I can hear the operator. She will ring the number, and "Is Mrs. Lowther there?" She gets on the line, and "We have a collect call, person to person, from Mr. Lowther. Will you accept charges?" And "Yes, I will." And the conversation goes on.

THE COURT. I will let it in.

(In open court:)

BY MR. LOWTHER:

Q Now, Mrs. Gross, in regard to that card there, which reflects a person to person, collect call, charges accepted, from yourself to the defendant Forte, on December 1, 1962, would you explain to His Honor

Bernice Gross - Direct Examination

and these ladies and gentlemen of the jury what you said to the operator and what if anything you heard the operator say to the defendant Forte before you started talking to him on that date.

A I told the operator, the long distance operator, I wanted to make a person to person, collect call to Dr. Allan Forte. I gave her 407 the phone number in Washington, D. C., and I told her this was Bernice Gross calling.

Q Go ahead. Did you hear the operator transmit any information to Forte, the defendant, before you started talking to him?

A Yes, I did.

Q Tell the Court and jury what you heard.

A The operator told him who I was, that it was a collect call, would he accept the charges.

Q And were the charges accepted.

A Yes.

THE COURT. You mean, by "who I was," Bernice Gross?

THE WITNESS. Bernice Gross.

BY MR. LOWTHER:

Q Now I want to show you, if I may--

MR. LOWTHER. Will you indulge me a moment, please,  
Your Honor?

Bernice Gross - Direct Examination

BY MR. LOWTHER:

Q     --Government's Exhibit numbered 6 for identification; and I want you to have it on the stand before you, and ask you this question: That call, I want you to assume, that phone ticket, reflects a person to person, collect call, from you to the defendant Forte, on December 3, 1962. I want you to tell His Honor and these ladies and gentlemen of the jury, after looking at that card, what if anything you told the operator 408     on that date, December 3, on that person to person, charges-accepted call, and what if anything you heard the operator tell the defendant Forte.

A     Do you want me to repeat this?--what I just said.

Q     I do, indeed. I do.

A     I called the operator, the long distance operator, and I told her that I wanted to make a collect, person to person call to Dr. Allan Forte in Washington, D. C. I gave her the phone number, and I gave her my name, Bernice Gross.

Q     And did you hear the operator have any conversation with the defendant Forte on that date of that call, December 3, before you talked with him, as you said you had?

A     The operator asked him if he was Dr. Forte, and he said yes. She said, "I have a collect call from Baltimore from Bernice Gross. Will you accept the charges?" And he said yes.

Bernice Gross - Direct Examination

Q Very well. Now showing you what has been marked for identification purposes as Government's Exhibit numbered 24, this card here, and assuming that it reflects a person to person, collect call on December the 18th, 1962 to a Dr. Forte from Miss Bee, a charges-accepted call, would you tell the Court and these ladies and gentlemen of the jury what if anything you told the operator and what if anything you heard the operator tell Dr. Forte on the date of that call, December 18, 1962.

409 A I told the operator that I wanted to make a long distance, collect, person to person call to Dr. Allan Forte, in Washington, D. C. I gave her the phone number, and I told her that Miss Bee was calling.

Q What if anything did you hear the operator, what information did you hear her transmit to Dr. Forte or the defendant Forte before you talked to him on that date?

A The operator asked Dr. Forte if it were he, and he said yes. She said, "I have a collect call from Miss Bee in Baltimore, Maryland. Will you accept the charges?" And he said yes.

Q All right. Showing you now what has been marked for identification purposes as Government's Exhibit numbered 25. And if you will, please, assume for purposes of my question that that card reflects a person to person call, on January the 7th, 1963, from Miss Gross to Dr. Allan Forte, charges accepted. Would you tell the Court and jury what you said to the operator in starting that call, and what if anything you

Bernice Gross - Direct Examination

heard the operator say to the defendant Forte before you talked with him on that day?

A I told the operator that I wanted to make a person to person, collect call to Dr. Allan Forte, in Washington, D. C. I gave her the phone number, and Miss Gross calling. The operator, when Dr. Forte got on the phone, said "Is this Dr. Forte?" He said, "Yes, it is." And she said, "I have a collect call from Miss Gross in Baltimore, Maryland. Will you accept the charges?"

Q Very well.

THE COURT. What did Dr. Forte say?

THE WITNESS. "Yes"--yes, he would.

MR. LOWTHER. Will you indulge me a moment, please, Your Honor?

BY MR. LOWTHER:

Q Showing you what has been marked for identification purposes as Government's Exhibit numbered 18, Mrs. Gross, and assume for the purposes of my question, as you were asked to assume before, that that card reflects a person to person, collect call from Idlewood 3, an exchange in Baltimore, to National 8-2001 in Washington, D. C. on Monday, October 29, 1962, would you tell, looking at the card, what information you gave the long distance operator on that date and what if anything you heard the long distance operator, what information you heard her give, if any, to the defendant Laughlin at National 8-2001?

Bernice Gross - Direct Examination

A Is there a time on here, Mr. Lowther, on this call?

Q Four forty-six p.m., assume.

411 A I told the operator that I wanted to make a person to person, collect call to Mr. James Laughlin in Washington, D. C. I gave her his phone number and I told her Bernice Gross is calling.

Q What if anything did you hear the operator say to the defendant Laughlin?

A Usually his secretary or some woman got on the phone first. And she would ask this woman if Mr. Laughlin was there, and she had a collect call from Baltimore, Maryland. Mr. Laughlin would then get on and accept the charges.

Q And when you say the defendant Laughlin would get on and accept the charges, what if anything did you hear the operator say to the defendant Laughlin?

A "Is this Mr. James Laughlin?" And he would say yes. And she said, "I have a collect call from a Bernice Gross in Baltimore. Will you accept the charges?" And he said yes.

Q Very well. Now in regard to Government's Exhibit numbered 10 for identification, which I am now showing you, I want you to assume, for purposes of my question, as you were asked to assume before, that that phone ticket, Government's Exhibit 10 for identification, reflects a person to person, collect call, from Baltimore, Maryland to National

Bernice Gross - Direct Examination

8-2001, on Thursday, November the 8th, at about 12:42 p.m. And I want you to tell His Honor and these ladies and gentlemen of the jury what if  
412 anything you told the operator in regard to that call, and what if anything you heard the operator say to the defendant Laughlin on that date before you talked with him.

A I told the operator that I wanted to make a person to person, collect call to Mr. James Laughlin in Washington, D. C. I gave her the phone number and told her Bernice Gross is calling. And again this secretary or woman in Mr. Laughlin's office answered the phone. The operator told her, asked for Mr. James Laughlin. Mr. Laughlin got on. The operator asked him if this was Mr. James Laughlin. He said yes. She said, "I have a collect call from Mrs. Bernice Gross in Baltimore, Maryland. Will you accept the charges?" And he said yes, he would.

Q All right. Showing you what has been marked for identification purposes as Government's Exhibit numbered 22 for identification, and assuming for purposes of my question, Mrs. Gross, that that ticket reflects a person to person, collect call, charges accepted, from the number Forest 7-7440 in Baltimore, Maryland to National 8-2001, on November the 27th, 1962, a Tuesday, I want you to tell His Honor and these ladies and gentlemen of the jury what if any instructions you gave the operator and what if any information you heard the operator give the defendant Laughlin on that date.

Bernice Gross - Direct Examination

A At what time was that, Mr. Lowther?

413 Q The time of that call, assume for purposes of my question, was roughly 9:16 a.m. in the morning, and it lasted roughly two minutes and 15 seconds.

A I called the operator and I told her I wanted to make a person to person, collect call to Washington, D. C., Mr. James Laughlin; and I gave her his phone number, Bernice Gross calling.

There were times when Mr. Laughlin would answer himself. So I don't know whether this was one of the times. I am not sure.

At any rate the operator, once she got Mr. Laughlin, asked him if this was Mr. James Laughlin. He said yes. She said, "I have a collect call from Bernice Gross in Baltimore. Will you accept the charges?" And he said "Yes, I will."

Q Very well. And in regard to this exhibit, Government Exhibit numbered 11 for identification--and assume for purposes of my question, if you will, that that ticket reflects a call, person to person call, from the number Forest 7-7440 to National 8-1690, at about 4:45 p.m., which lasted for about two minutes and 45 seconds, February the 19th, being a Tuesday--would you tell the Court and these ladies and gentlemen of the jury what if anything you told the operator on that date, what instructions you gave her, and what if anything you heard the operator say to the defendant Laughlin, please.

Bernice Gross - Direct Examination

414 A I told the operator that I wanted to make a person to person, collect call to Mr. James Laughlin in Washington, D. C. I gave her his phone number, and I told her Mrs. Gross calling. Once again I don't recall whether the secretary or Mr. Laughlin answered the phone. At any rate, when he did get on she said, "Is this Mr. James Laughlin?" He said yes. She said, "I have a collect call from a Mrs. Gross in Baltimore, Maryland. Will you accept the charges?" And he said he would.

MR. LOWTHER. That completes my direct examination,  
Your Honor.

\* \* \*

Bernice Gross - Cross Examination

427 MR. LAUGHLIN. In other words, I will present here, confront her with her testimony, either in the form of testimony or in the form of statements that she made, and of which we have the record and we have the transcripts. I can assure you we will connect it up.

THE COURT. As I understand now, so there will be no misunderstanding, you state that you will be able to get from her that Wallace went to her and urged her and prevailed upon her to testify falsely in this case against you--in other words, that in what she said here she testified falsely against you at the urging of Wallace?

MR. LAUGHLIN. At the urging of Wallace.

MR. LOWTHER. May I break in? I think at this time counsel  
428 should show to the Court specifically what he has by way of confrontation.

THE COURT. He is going to do it tomorrow morning. And I am going to hear these tapes tomorrow morning.

MR. LAUGHLIN. Your Honor, let me say this. That might be well. I think we ought to hear those tapes.

THE COURT. We will hear them tomorrow morning.

MR. LAUGHLIN. I think we ought to hear all of them. As you know, you can't do this in one thing; you have to do it in a combination of things. I can assure you it is all going to be connected up.

Bernice Gross - Cross Examination

The request I make now, Your Honor, is that the apparatus be made available. And we have the tapes between Gross and Wallace and Gross and Sullivan.

THE COURT. Do you have the apparatus?

MR. LAUGHLIN. No; they will have it.

MR. LOWTHER. We will have one, Your Honor.

THE COURT. Bring it in at ten o'clock tomorrow morning.

MR. LOWTHER. And in order that I may be clear, Your Honor, what Your Honor wants to hear--

THE COURT. Simply what he says he has got. He says he has a tape recording of a conversation between this witness, Gross, and Wallace, when Wallace is telling this witness, Gross, to testify falsely against James J. Laughlin.

429 And he said he also has statement made by this witness, Gross, that she was told by Wallace to testify falsely. And they will be here at ten o'clock tomorrow morning.

MR. LAUGHLIN. Let me say this, Your Honor. I don't know that the word "falsely" was used; but the whole substance of it will be to that effect, Your Honor. I don't say he just came out and said, "I want you to testify falsely."

THE COURT. What I want to know, gentlemen, is how long will this take. In other words, I don't want this jury to come back for

Bernice Gross - Cross Examination

30 minutes of testimony tomorrow. There is going to be no trial tomorrow afternoon. Are we going to spend most of the morning listening to tapes in my chambers?

MR. LOWTHER. Will you let me leave the bench for one minute, Your Honor, and I will be right back?

THE COURT. Very well.

(Counsel having returned to the bench:)

MR. LOWTHER. It was my recollection that in the prior trial, before Judge Hart, this tape that he, the defendant Laughlin, made mention of to Your Honor before, just before I went back to counsel table, was played, one afternoon. We didn't get out of Judge Hart's court until after six o'clock, p.m. The tape was transcribed by his court reporter, George Davis, and the transcription of it appears in the regular trial  
430 before Judge Hart. That is what I was trying to pick out for Your Honor.

THE COURT. Do you take any exception to that statement, that it was played and transcribed?

MR. LAUGHLIN. Your Honor, it is partly correct. Not all of them were played. I am going to ask now that counsel say to you what tapes he has in his possession.

THE COURT. It is your tape we are talking about. You are the one who had the tape, I thought.

Bernice Gross - Cross Examination

MR. LAUGHLIN. No. They have the tapes, Your Honor; they have the tapes. The way this came about, Your Honor, we wanted to know what took place between Wallace and Gross, Wallace and Sullivan, Sullivan and Gross. And certain tapes were produced at the time. The jury was excluded.

I think his statement is correct. It was something, three or four hours. But they were not all played. So what I would like for him to say to you is what of the tapes they have in their possession, first, how many are between Wallace and Gross, how many between Gross and Sullivan, and how many between Sullivan and Wallace.

THE COURT. Wait a minute. Between Wallace and Sullivan won't come in. But I assume the Jencks Act would permit the tape of Gross making a statement or testifying, whatever it was. I assume counsel would not disagree.

431 MR. LOWTHER. That would be a proper Jencks Act production, yes, Your Honor.

THE COURT. But any tapes between Wallace and Sullivan certainly have nothing to do with this. They would not impeach her.

MR. LAUGHLIN. Well, Your Honor, as of now I agree. But I think it would.

THE COURT. We are dealing with the present now, and the hereafter later.

Bernice Gross - Cross Examination

MR. LAUGHLIN. Yes.

THE COURT. But do we have all the tapes in which Gross participated?

MR. LOWTHER. We do.

THE COURT. Were they played the last time and were they transcribed?

MR. LOWTHER. The tapes that were played the last time, Your Honor, were a tape of a telephone conversation, two phone conversations on the same evening, between Bernice Gross and Sergeant Samuel Wallace. There was also played the last time phone conversations recorded between Harold Sullivan and Bernice Gross--Assistant United States Attorney Harold Sullivan and Bernice Gross. And that is my recollection of what transpired.

432 THE COURT. Are there any other tapes with Gross' voice on them?

MR. LOWTHER. Not to my knowlege. I will check with Mr. Sullivan, Your Honor, and let you know.

THE COURT. If there are, you will bring them in tomorrow morning. If there are not, in other words, if everything has been played or reproduced--heard, at least--in the first trial, and transcribed, why do I have to sit here and listen to them? Can't I read the transcription?

Bernice Gross - Cross Examination

MR. LAUGHLIN. That's what I was coming to, if we are certain, Your Honor, that we have them all. If we have that assurance, then we can save a lot of time.

THE COURT. I would think so, too.

MR. LAUGHLIN. But I want to be certain we do have them all.

THE COURT. He is going to check on this.

\* \* \*

463 THE COURT. After we adjourned last evening I think you were going to ascertain whether or not the defendants have seen or had an opportunity to hear all of the tapes on which Mrs. Gross' voice was recorded. Did you find that out?

MR. LOWTHER. I have found that out, Your Honor please.

Your Honor, I represent to the Court that at the trial before Judge Hart the tape recordings of two telephone conversations between Mrs. Gross and Sergeant Samuel Wallace were played in the courtroom with Judge Hart in chambers, or in and out of the courtroom, I should say, when the occasion arose, and that the tape conversations of telephone conversations, some 12 in number, between the Assistant United States Attorney Harold J. Sullivan and Mrs. Gross were also played and transcribed as best they could be; that the tape of the phone conversations, Your Honor, between Mrs. Gross and Sergeant Wallace was taken to the

Bernice Gross - Cross Examination (Proceedings)

Federal Bureau of Investigation laboratory to see whether or not the Federal Bureau of Investigation laboratory could make them sound any more audible, for the lack of a better term, understandable I should say.

They reported they could not. They tried various techniques and they said if they brought up the voice, to put it in layman's language, if they brought up the voice part of the thing they would also bring up the  
464 background noise so it would not be any better.

The transcription of those tapes starts on--well, the prelude to it starts on page 342 of the trial before Judge Hart and the actual first tapes themselves start at page 348 with Mr. Sullivan, Assistant United States Attorney Sullivan on the stand, and the first transcription designation of it is on page 349; tape recording of two phone calls made by Bernice Gross in her home in Baltimore to Detective Sergeant Wallace of the Homicide Squad, Washington, D. C., on July 24th, and then they go thereafter with the tapes, the actual tapes being marked for identification and the identification of them by Mr. Sullivan, and after all of the tapes were marked which was concluded over here--it starts at page 364. Your Honor.

THE COURT. In between there also tapes were marked that recorded the conversation between Sullivan and Mrs. Gross?

Is that right?

MR. LOWTHER. That is correct, sir.

Bernice Gross - Cross Examination (Proceedings)

THE COURT. And it actually starts at page 357?

MR. LOWTHER. The actual tapes, Your Honor, start at page 365.

THE COURT. Yes, sir. And they continue how far, now?

MR. LOWTHER. All the way to the very end of the volume, over to page 478. That is the last tape. Judge Hart then returned to the  
465 bench and that was the end of the session that day which concluded at 6:35 p.m., Your Honor.

THE COURT. And there were no other tapes played on any other day? Is that right?

MR. LOWTHER. There were not of the conversations Your Honor has made inquiry about.

THE COURT. Between Bernice Gross and Mr. Sullivan?

MR. LOWTHER. Correct. Mr. Sullivan, Bernice Gross, and Sergeant Wallace.

THE COURT. Do you have any other tape recordings?

MR. LOWTHER. No. We have recordings of her voice with the Defendant Laughlin, Your Honor.

THE COURT. That is out of this case. I assume that you do not want that in there.

MR. LOWTHER. No.

Bernice Gross - Cross Examination (Proceedings)

THE COURT. In other words, we have them recorded and we have heard in Court and in this transcript all the tape recordings that contain the voice of Bernice Gross except her conversation with Mr. Laughlin over the telephone?

MR. LOWTHER. Correct, sir.

THE COURT. Now Mr. Laughlin and Mr. Garber, you have heard Mr. Lowther. Do you have any comments?

MR. LAUGHLIN. Your Honor, I would like to inquire whether there have been any tapes or any statements in writing since the month of April of 1964?

THE COURT. Since the month of April of 1964?

466 MR. LAUGHLIN. That is of the trial. Since that case.

THE COURT. Any other tapes since then, Mr. Lowther, of Bernice Gross?

MR. LOWTHER. Not to my knowledge. But in order that the Court may be accurately informed I will call Mr. Sullivan.

MR. LAUGHLIN. And also whether there have been any written statements?

THE COURT. Any Jencks' statements either recorded or in writing since April of 1964?

Do you want to call him now?

MR. LOWTHER. He is right outside here.

Harold Sullivan - Direct Examination

THE COURT. Fine

Whereupon

HAROLD J. SULLIVAN

having been called as a witness by the Government, and having been duly sworn, took the stand, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. LOWTHER:

Q Your name is Harold J. Sullivan, you are a United States Assistant District Attorney for the District of Columbia, you are now, and you were the last year and a little bit before that?

Is that correct?

467 A That is correct.

Q Now, I want to bring your attention, if I may, to the month of April, 1964, the month in which the case presently before His Honor was tried before Judge Hart. And my question to you is this:

Have there been any phone calls recorded since April of 1964 between Mrs. Gross, and anyone else, to your knowledge? By anyone else, I mean you or Sergeant Wallace?

A There have been no such recordings.

Q Very well.

And have there been any signed statements by Mrs. Gross given since April of 1964 concerning this case?

Harold Sullivan - Direct Examination

A There have been none.

MR. LOWTHER. Very well.

THE COURT. Mr. Sullivan, I think Mr. Lowther stated any tape recordings or phone recordings or any recordings between Mrs. Gross, Sergeant Wallace, or yourself. And you said none.

Were there in so far as you know between anybody and Mrs. Gross?

THE WITNESS. No, Your Honor, no such recordings were made since that time.

THE COURT. Mr. Laughlin?

CROSS EXAMINATION

BY MR. LAUGHLIN:

468 MR. LAUGHLIN. Your Honor, while Mr. Sullivan is here.

BY MR. LAUGHLIN:

Q Mrs. Gross testified before the grand jury in March of 1964, did she testify before the grand jury at any time after that?

A She did not, sir.

MR. LAUGHLIN. I have nothing further unless Mr. Garber has, Your Honor.

THE COURT. Do you have any questions, Mr. Garber?

MR. GARBER. Would Your Honor indulge me a moment?

THE COURT. Surely.

Harold Sullivan - Cross Examination (& Discussion)

MR. GARBER. No, no questions.

THE COURT. Very well.

Mr. Lowther?

MR. LOWTHER. No further questions, Your Honor.

THE COURT. You may step down, Mr. Sullivan.

(Whereupon, the witness withdrew  
from the stand.)

THE COURT. Now it would seem Mr. Laughlin and Mr. Garber that you have already had everything that the Jencks' Act would give you as far as Mrs. Gross is concerned. You had and got them here as documents in the record, her various appearances before the grand jury, her being interviewed in Mr. Hannon's office by Mr. Hannon and Mr. Sullivan.

469        You had the recordings in which her voice was recorded and there appears to be nothing else.

MR. LAUGHLIN. I cannot think of anything. I may ask Mr. Garber whether he can. As I understand too, from Mr. Sullivan's testimony there were no written statements we have not seen?

THE COURT. No statements, no testimony, no reports.

MR. LAUGHLIN. And frankly I cannot think of anything else, Your Honor.

Let me confer with Mr. Garber for a minute, Your Honor please.

Discussion

THE COURT. Surely.

MR. LAUGHLIN. Your Honor, I wanted to get Mr. Garber's agreement on this. It appears, Your Honor, as Your Honor said, everything under the Jencks' Act we could have. However, if there is contradiction in her testimony--in other words if her testimony is in conflict with what appears in these we may then, Your Honor, have to request to have the tapes played or is it your view that we should be governed by the voice that appears in the transcripts?

THE COURT. I would assume so. I haven't heard them, of course.

\* \* \*

THE COURT. Well, what about the requested instruction?

MR. LAUGHLIN. Well, Your Honor, I have quite a number in tentative form.

THE COURT. Are there going to be a difference in those you tendered to Judge Hart?

MR. LAUGHLIN. Well, there will not be a great deal of difference, Your Honor, except after I had the benefit of additional works on the matter. I do not know whether Your Honor is conversant with it but just recently it was called to my attention and I didn't know of this excellent work. It is called Conrad, C-o-n-r-a-d, Legal Services and I think it has Wigmore beat. Wigmore is so voluminous. This is just

Discussion

two volumes. And Wigmore dates back and it goes into so many English  
472 cases.

This is more modern. I just came across that. So I am preparing some additional instructions based on Conrad Legal Services. Two volumes.

THE COURT. How about you, Mr. Garber, have you got some additional instructions to tender?

MR. GARBER. Your Honor, I will be consulting with Mr. Laughlin to see that we do not duplicate any requests.

THE COURT. Well, let us get these instructions in. I assume we are not going to finish this case this week.

\* \* \*

Bernice Gross - Cross Examination (Resumed)

## Proceedings

664 THE COURT. Now with respect to Sergeant Wallace and Mrs. Gross, I have read the transcript from the first trial in this case, which set forth apparently to the best that could be obtained from the recordings of, I believe, two telephone conversations between Mrs. Gross and Sergeant Wallace. As I understood, Mr. Laughlin, your position was that you felt that that recording showed that an effort was made--and if not successful, an effort at least--was made by Sergeant Wallace to bribe Mrs. Gross or otherwise influence her to testify in order to get you, as you phrased it, I believe. Now I have read that transcript, sir, and I just can't find that in it. I frankly admit it is a kind of a garbled thing; but that I gathered from the comments being made while the transcription was being made here in court at the time of the first trial. The difficulty was the mechanical reproduction of it, because you were complaining, and I know Mr. Forte complained at one time that he couldn't hear it, and you two or three times. I don't know whether Mr. Garber was complaining, but I'm sure he was probably joining in the thought that he couldn't hear it. And at one time, at least, when Judge Hart came back on the

665 bench, you, Mr. Laughlin, made some complaint about it. And Judge Hart stated, "Bring your own machine," and you said you didn't have a machine.

Proceedings

On an earlier occasion when Judge Hart came in and some complaint was being made that it was impossible to hear it, as I read the transcript, Judge Hart said, "Well, put it up on the table, then, and sit around the table so you can hear it as well as you can."

Now I have read the thing and, sir, I can't find what you mean by drawing the conclusion that a bribe was made or some effort was made to bribe her.

MR. LAUGHLIN. Your Honor, I don't think I used the term that he was trying to bribe her.

THE COURT. That he was trying to influence her?

MR. LAUGHLIN. Yes.

THE COURT. All right.

MR. LAUGHLIN. And, Your Honor, I think not only that can be said, but various other conversations that she had with Wallace--that is, referring to "she," I mean Mrs. Gross--had with Wallace, over a considerable period of time.

Now, as I think I mentioned at the bench, he didn't come out and say, "I want you to testify falsely"--I think if you will look at the notes for the other day, if they have been written up.

666 THE COURT. Sir, I don't mean to put words in your mouth. But I got the impression, and I think you meant to convey the impression, that her relationship with Wallace was such that it could be inferred that

Proceedings

she was being asked to do something wrong, in order to get you. Isn't that right?

MR. LAUGHLIN. Yes, that's right--and to get, also, Dr. Forte--to get both, but particularly aimed at me.

Now, Your Honor, we are not making any request that this recording be played to the jury. But, however, I submit, with the contents of the recording in the transcript, if there is anything in the way of impeachment, we have a right to impeach her by anything that she said there.

THE COURT. You certainly have, if it is impeaching material.

MR. LAUGHLIN. Yes, assuming it is impeachable material; that's right. And I think, as a matter of fact, we probably won't reach that aspect, Your Honor, until at least late this afternoon.

THE COURT. I thought we might as well review what you have studied since we left here Tuesday.

MR. LAUGHLIN. Yes, that's right.

THE COURT. And I want to tell you right now that I cannot find in that transcript of that recording any evidence, in my opinion, that  
667 would show that he was trying to influence her. Now you will develop it as you go along; and of course it wouldn't come up unless she denies--and whether she does or doesn't, I don't know. Was this question asked of her in the first trial, whether Wallace attempted to influence her to testify--

Bernice Gross - Cross Examination (Resumed)

673 BY MR. LAUGHLIN:

Q Mrs. Gross, having in mind your visit to Washington in March of 1963, you at that time already knew Dr. Forte, didn't you?

A Yes, I did.

Q Because, as I believe from your testimony, when you were on the abortion squad in Baltimore, you did have some connection with Jean Smith. Is that correct?

A Yes, I did.

Q Now, Mrs. Gross, the first time that you talked to Dr. Forte, will you give us again, if you can, the best you can, the time of that-- if you can, the month, and, if possible, the date.

674 A I would approximate it to be about May of 1962.

Q Then the first time that you had any conversation with Dr. Forte with respect to either the trial of Dr. Forte here or any conversation with him with regard to Jean Smith, give us the date of that.

A The first time I had a conversation with him?

Q Yes.

A In May of '62, when he called me.

Q And that was after you had left the police department?

A After I was dismissed, yes.

Q Now in that conversation, is your recollection clear on what was said by Dr. Forte and said by you at that time?

Bernice Gross - Cross Examination

A Word for word, no.

Q Give us the substance of it.

A You want to know what he said to me?

Q Yes.

A He said he was very sorry to hear what had happened to me on the police force, that I had been dismissed. He told me he was an old man, he was sick, and stood a chance of being deported; and if I could help him, he would take care of me, and also of Jean Smith; did I know her well enough to call her. I told him I would call her--I would try. He would keep in touch with me.

\* \* \*

679 Q And where was that?

A In the Hecht Company in Northwood, Baltimore.

Q And what was discussed at that time?

A We discussed my being dismissed from the police department. And we also discussed the fact that somebody in Baltimore had asked me if I wanted to get back on the force, and it would cost me \$500. We discussed that. We discussed Jean Smith. And that was it.

You gave me your card, your business card, and told me you would keep in touch with me.

Q In that conversation, first, what was the length of it?

A It wasn't very long. I would say about 22 minutes.

\* \* \*

Bernice Gross - Cross Examination

689 BY MR. LAUGHLIN:

Q Now, you said earlier this morning that there was a time that I made some suggestion about money? Did you say that?

A No, I did not.

Q Did I ever at any time, in any of the meetings with you, ever suggest money?

A No, sir; you did not.

Q Did I ever pay you any money?

A No, sir; you did not.

Q As a matter of fact, in the conversations we had discussed a Mr. Smithson, hadn't we? Do you remember that name?

A I remember it. But I never met Mr. Smithson. I don't know him.

Q Well you knew that Mr. Smithson was handling the case, didn't you?

A I tell you the truth, Mr. Laughlin, I don't know who was handling the case. The abortion case, you are talking about?

Q I'm talking about Dr. Forte's case.

A I don't know who was handling it.

\* \* \*

711 THE COURT. But he is directing your attention now, Mrs. Gross, to the time that you testified before Judge Youngdahl, in October, 1963. Were these questions put to you and did you give these answers?

Bernice Gross - Cross Examination

Now go ahead.

BY MR. LAUGHLIN:

Q Beginning at page 117--

THE COURT. Page 117?

MR. LAUGHLIN. Beginning toward the bottom of 117, Your Honor.

THE COURT. Very well.

BY MR. LAUGHLIN:

Q (Reading) "What did he say with respect to Samuel Wallace?

"Answer: He told me that it was an investigation, there was an investigation being carried on about Sergeant Wallace, and that he wanted to ask me some questions about it."

712 The top of 118:

"Investigation about what, Mrs. Gross?

"Answer: About his shaking down Dr. Forte."

Now--

THE COURT. I think you have to ask the next question.

MR. LAUGHLIN. All right.

BY MR. LAUGHLIN:

Q "All right. Is that the way he put it?

"Answer: No; I don't know how he put it.

"Question: Anyway, you understood it was to be an investigation as to Samuel Wallace?

Bernice Gross - Cross Examination

"Answer: Yes, sir."

Now, in the courtroom of Judge Youngdahl, on October 7th, 1963, were you asked those questions and did you make those answers?

A Yes, sir.

Q And were they true?

A Yes, sir.

Q Now, Mrs. Gross, after your first appearance before the grand jury, do you know about what time of day that was, having in mind March 1st, 1963 you had appeared before the grand jury--and some time ago I asked you a question with respect to it. What time did you finish,  
713 the best you can recall, your first appearance before the grand jury?

A I don't recall if it was before lunch or after lunch. I don't remember.

Q Now, were you at that time excused?

A At what time?

Q After you appeared before the grand jury, the first time?

A Was I excused?

Q Yes.

A You mean for the day? No, sir; I wasn't.

Q Now, were you taken somewhere?

A Yes.

Bernice Gross - Cross Examination

Q Where were you taken?

A I was taken to a Mr. Hannon's office.

Q Is that in this courthouse?

A Yes, it is.

Q Is that Mr. Joseph Hannon, Assistant United States Attorney?

A Joseph Hannon, yes, sir.

Q Who was it who told you, or who was it who directed you to go to Mr. Hannon's office?

A I think it was Mr. Sullivan.

Q And were you told why?

A Not at that time, no.

714 Q Now I will ask you this: Were you in custody?

A You mean, were there any police around? Were any police around?

Q What I mean, were you in custody? Were you free to come and go?

A Oh, I don't know. I just went along. I obeyed him and I went. I wasn't in custody.

Q Now then, did you have lunch?

A Yes, I did.

Q And was this before you had lunch, or after lunch?

A It was after I had lunch.

Bernice Gross - Cross Examination

Q Now, then when you were taken to Mr. Hannon's office, who was present?

A Mr. Sullivan, Mr. Hannon, and I believe a stenographer, and myself.

Q Now, then after you got there, Mrs. Gross, were you told why you were there?

A Eventually I was told, yes, sir.

Q Were you told that you had committed perjury?

A Yes, I was.

Q And you were afraid of being prosecuted, weren't you?

A Yes, I was.

Q Because you had testified to something that was false, and you knew it to be false?

715 A Yes, sir.

Q And then you naturally were in fear, weren't you?

A I would say so.

Q Ma'am?

A I would say so.

\* \* \*

Bernice Gross - Cross Examination

752

CROSS EXAMINATION  
(RESUMED)

BY MR. LAUGHLIN

Q Mrs. Gross, you have already told us that when you went in Mr. Hannon's office that you were in fear. Is that right?

A I said you might call it that, yes, sir.

753 Q Well, you thought you might be indicted, didn't you?

A Yes.

Q And you didn't want to be indicted?

A Who would?

Q Is your answer "No"?

A That's right.

Q And therefore you wanted to cooperate with them, didn't you?

A Yes.

Q In other words, you wanted to answer, to give the answers they wanted; isn't that right?

A No--the truth.

Q Well now, Mrs. Gross, when you left Mr. Hannon's office, did you feel that you were safe?

A No, Mr. Laughlin, I did not.

Q Do you feel you are safe, even as of now?

A No, sir, I do not.

Bernice Gross - Cross Examination

Q You still feel that you might be indicted?

A Yes, sir.

Q And you still feel that you should cooperate with the United States Attorney?

A I have up until now, yes, sir.

Q And you feel that you should continue to do so?

A Yes, sir.

\* \* \*

774 BY MR. LAUGHLIN:

Q Mrs. Gross, I believe you said, in connection with that recording, that you had not previously said anything about my meeting with you. And that was really the main purpose of the recording; is that right?

A No, I didn't say that.

Q Other than that, what was the other purpose of the recording?

A You will have to ask Mr. Sullivan that, why he wanted it recorded. I don't know.

Q Do you have any recollection of anything else that was said by you in that recording?

A No. I have a recollection of what was said to me by Sergeant Wallace.

Q Do you have any recollection of what you said?

A No, sir, I don't.

Bernice Gross - Cross Examination

775 Q Did you say to Sergeant Wallace, "Are they on to you?"

A No; I don't recall that

Q You deny that?

A No; I don't recall that.

Q Did you say to Sergeant Wallace that, "You're sitting on a  
keg of dynamite"?

A I don't recall that, either.

MR. LAUGHLIN. At page 376, Your Honor, transcript April  
21.

THE COURT. Yes. Let me find it--376?

MR. LAUGHLIN. Page 376, Your Honor.

THE COURT. Of the April 21, 1964?

MR. LAUGHLIN. Yes, sir.

THE COURT. Let me take a look at it.

Come to the bench, gentlemen.

(At the bench:)

THE COURT. I read these things yesterday, and I frankly  
can't tell whose voice is what. Can you?

MR. LAUGHLIN. Well, Your Honor, --

THE COURT. For instance, who started this, this second  
conversation on July 24th--"and it starts right here with this kind of a  
blurt: (Reading on page 375)

Bernice Gross - Cross Examination

Q You still feel that you might be indicted?

A Yes, sir.

Q And you still feel that you should cooperate with the United States Attorney?

A I have up until now, yes, sir.

Q And you feel that you should continue to do so?

A Yes, sir.

\* \* \*

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Q Other than that, what was the other purpose of the recording?

A You will have to ask Mr. Sullivan that, why he wanted it recorded. I don't know.

Q Do you have any recollection of anything else that was said by you in that recording?

A No. I have a recollection of what was said to me by Sergeant Wallace.

Q Do you have any recollection of what you said?

A No, sir, I don't.

Bernice Gross - Cross Examination

775 Q Did you say to Sergeant Wallace, "Are they on to you?"

A No; I don't recall that

Q You deny that?

A No; I don't recall that.

Q Did you say to Sergeant Wallace that, "You're sitting on a keg of dynamite"?

A I don't recall that, either.

MR. LAUGHLIN. At page 376, Your Honor, transcript April 21.

THE COURT. Yes. Let me find it--376?

MR. LAUGHLIN. Page 376, Your Honor.

THE COURT. Of the April 21, 1964?

MR. LAUGHLIN. Yes, sir.

THE COURT. Let me take a look at it.

Come to the bench, gentlemen.

(At the bench:)

THE COURT. I read these things yesterday, and I frankly can't tell whose voice is what. Can you?

MR. LAUGHLIN. Well, Your Honor, --

THE COURT. For instance, who started this, this second conversation on July 24th--"and it starts right here with this kind of a blurt: (Reading on page 375)

Bernice Gross - Cross Examination

"Voice: When?

"Voice: Will call me back?

776 "Voice: Wanted to know your number.

"Voice: --me the charges, yes, you want the bill.

"Voice: And she said no, but I will pay the bill.

"Voice: Oh, no--

"Voice: Yes, she did. She called me and gave me the charges.

"Voice: But anyway, Sullivan--he says--

"Voice: What's that noise? You got this taped?"

Who is speaking?

MR. LAUGHLIN. Your Honor, the only way we can answer it, we had it played, a female voice and then a male voice.

THE COURT. Can both sides agree whose voice it is? And I assume what you are going to is this here:

"Voice: Listen, they got anything on you, are they on to you at all?"

MR. LAUGHLIN. Yes. That's the female voice.

THE COURT. "You know I got"--

MR. LAUGHLIN. That's the female voice. And also if you will look at the bottom, page 377.

THE COURT. "I am sitting here on a keg of dynamite"--

Bernice Gross - Cross Examination

"Taken me in--to protective custody--where they going to put me?--oh, that's all I need--well, I'm getting a little mad, too, so don't worry--don't--don't worry about me his getting mad. What the hell does he think I am? I am sitting here on a keg of dynamite--oh, I'm safe here--what, you kidding? I wouldn't--"

You claim that is her voice?

MR. LAUGHLIN. Yes, Your Honor.

THE COURT. And you admit that is her voice?

MR. LOWTHER. I don't, not at this time.

THE COURT. We will have to play it, then, and I will have to decide whose voice it is.

MR. LOWTHER. Your Honor, I would say this. I am sure the voices in this conversation are the witness Gross and Sergeant Wallace. But which is which--

THE COURT. If you cannot agree, gentlemen, I will have to listen to it.

MR. LAUGHLIN. As I think I probably mentioned to you yesterday morning, Mr. Garber and I discussed as to whether we were going to request Your Honor to have the apparatus set up and played. But I thought it would take an awful lot of time, and I had this in mind. I think we are faced with a problem, that I mentioned yesterday, a denial.

Bernice Gross - Cross Examination

Now there is an agreement here now that there was a male voice and a female voice. The female voice is Gross; the male voice is Wallace.

778 THE COURT. I understand both sides agree as to that.

MR. LAUGHLIN. And then there is a question--I remember this particular thing, Your Honor, this one thing--that Mr. Garber took a special note.

THE COURT. The thing is, if Mr. Lowther is not in agreement with you, I am going to have to hear it, gentlemen. How long is it going to take? This one wouldn't take too long would it?

MR. LOWTHER. No. The two conversations between this witness and Wallace should not take more than, I think, an hour, and maybe less. But we will have to get the apparatus.

THE COURT. We are going to do that tomorrow morning. I have a sentence and a motion for a new trial. Immediately thereafter we will have this machine set up and I will listen to this and decide which voice is which. I will tell the jury to come at 11 tomorrow morning.

\* \* \*

## PROCEEDINGS

784 THE DEPUTY CLERK. The United States of America against Allen U. Forte and James J. Laughlin.

(The jury is not in the courtroom.)

THE COURT. Do we have the machine set up? Now, gentlemen, I think we are going to have to be able to do this, if it can be done -- and I don't know how these machines operate -- you can stop it at any point, can you, and turn it back?

MR. LOWTHER. You can, Your Honor.

THE COURT. I think you ought to be able to do that, because there is no sense going through a tape and then going over it again if somebody says, "Well, back there is something I want to hear." I think what we ought to do is start with the premise that we will first try to find out whose voice is saying what; and if there is any question about it by anybody, let them raise their hand and the machine be stopped and go back.

And I personally am going to try to put alongside, in the transcript of the first trial of this case -- United States of America versus Forte and Laughlin, Criminal Action No. 600-63 -- that part of the transcript which appears in the proceedings of April 21, 1964 and which had to do with hearing the recordings out of the presence of the jury.

785 As I understand, all parties agreed that what appears on -- would one of you please tell me just exactly what page the --

MR. LOWTHER. Page 365, Your Honor.

THE COURT. -- commencing on page 365 --

What is this over on 364, Mr. Lowther?

MR. LOWTHER. That, Your Honor, is Mr. Sullivan's voice.

As I understand it, there was a call made to the telephone number that you

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get the time from over the phone, Your Honor -- something like that. He can explain it to you when he comes in. But that is not Mrs. Gross' voice, sir.

THE COURT. It is not?

MR. LOWTHER. It is not, sir.

THE COURT. Is there any question, gentlemen?

MR. LAUGHLIN No, Your Honor. I think it is correct, Your Honor, that we would really begin at the bottom of page 365, about five or six lines from the bottom.

THE COURT. Where it says, "Voice: Operator, I want to make a person-to-person call?"

MR. LAUGHLIN. Yes.

THE COURT. Now, where is Mrs. Gross?

MR. LOWTHER. She is in the witness room, Your Honor.

THE COURT. I think she should be here, so she can listen in, too, and any question that we have can be put to her, so far as, "Is  
786 that your voice, or somebody else's voice?" Is that the  
idea?

MR. LOWTHER. Yes, sir.

THE COURT. All right, let's bring her in.

MR. LOWTHER. And I have two further suggestions, if the Court would entertain them.

THE COURT. Yes.

MR. LOWTHER. I would like the door to the jury room closed at this time, so there can be no possibility of the jurors hearing these tapes at this time.

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And I further would request that Your Honor would make available a marshal outside the courtroom door, since the jury has been instructed to come back at 11, and it would be unfortunate, I believe, if any of them came wandering in this way to get to the jury room.

THE COURT. Oh yes.

Mr. Palmer, you will --

DEPUTY MARSHAL PALMER. I am already sending for another deputy, Your Honor.

THE COURT. Thank you, sir.

All right. Now we are waiting for Mr. Sullivan?

MR. LOWTHER. For Mr. Sullivan, yes, Your Honor.

(Mr. Harold Sullivan, Assistant United States Attorney, is now in the courtroom.)

787 THE COURT. Gentlemen, I understand while Mr. Sullivan is in the room, these tapes being agreed to by all parties as tapes being an actual recording of the conversation between Mrs. Gross and Sergeant Wallace, it will not be necessary, therefore, to have Mr. Sullivan identify them again. Is that correct?

MR. LAUGHLIN. No, that is not necessary, Your Honor.

THE COURT. But we will do this. We will identify the particular tape by a marking, as Defendants' Exhibit -- since the defendant seems to desire it -- as Defendants' Exhibit 2, is it, Mr. Laughlin?

MR. LOWTHER. I would prefer it be marked as a Government's exhibit, if the Court please.

THE COURT. All right, a Government's exhibit -- and you can have it yours, too, if you wish. Anyhow, the Government wants it as an exhibit.

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Do you want it marked as yours, as your exhibit too, Mr. Laughlin?

MR. LAUGHLIN. It might be well if that's done, Your Honor.

THE COURT. Then we will make it Government's Exhibit whatever it is.

THE DEPUTY CLERK. It is 36, Your Honor.

788 MR. LOWTHER. And the envelope marked, Your Honor, as the envelope that contains the tape. The tape itself is on the machine, sir.

THE DEPUTY CLERK. It will be Defendant Laughlin's Exhibit No. 2.

THE COURT. It will be both defendants, I believe.

Is that right, Mr. Garber?

MR. GARBER. Yes, Your Honor.

THE DEPUTY CLERK. If it is both defendants, it will be Defendants' Exhibit No. 6.

THE COURT. Very well.

(The tape was accordingly marked for identification as Government's Exhibit No. 36 and as Defendants' Exhibit No. 6.)

THE DEPUTY MARSHAL. Your Honor, all the doors are locked and I have the deputy outside. Do you want to let spectators in, or do you just want us to close it off until after the jurors are in the jury room?

THE COURT. What about it? You people have heard this before. Do you want to keep spectators from coming in now to hear it? You have heard of this problem you have of audibility in this. I have not heard it.

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MR. LOWTHER. Under Judge Hart's ruling the last time, Your Honor, the courtroom was cleared.

MR. GARBER. There may be a problem with the opening  
789 and closing of doors sometimes.

MR. LAUGHLIN. It is immaterial to us, Your Honor.

THE COURT. What about the three gentlemen who are sitting there? Is there any objection to their sitting there?

MR. LAUGHLIN. I have none, Your Honor.

THE COURT. Do you have any objection to their sitting there, Mr. Lowther?

MR. LOWTHER. No, Your Honor.

THE COURT. You gentlemen who are spectators, if you are here, you are here through this tape. You can't be going in and out of that door. You understand? You can hardly breathe, actually, because we need all the audibility we can get. So don't be going back and forth.

And nobody else can come in, Mr. Palmer.

Now, Mrs. Gross, where is she going to sit? Where is the best place for her to sit?

MR. LOWTHER. This, Your Honor, to use the term, is jacked into Your Honor's courtroom loud speaker, so that it will come over the courtroom amplifying system, as it is presently set up. But it also means that if Your Honor wants to hear any conversation or talk from any of the people in the courtroom, there will have to be a mechanical adjustment on the machine so that the amplifying system would work for the living voice in the courtroom.

790 THE COURT. I understand. But if anyone speaks up, Mr.

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Lowther, while this thing is jacked, or whatever you call it, it wouldn't put anything on the tape, would it?

MR. LOWTHER. No, it would not.

THE COURT. In other words, it would be a dead mike so far as anyone sitting on that witness stand is concerned, --

MR. LOWTHER. Correct.

THE COURT. -- until something is done mechanically?

MR. LOWTHER. That is right.

THE COURT. In other words, by jacking it into whatever you call it, we should all be able to hear it over our public address system?

MR. LOWTHER. Correct.

THE COURT. Then Mrs. Gross ought to be able to sit on the witness stand, and hear it just as well as I can?

MR. LOWTHER. She should be able to.

THE COURT. Mrs. Gross, if you will sit up there, please.

Thereupon

BERNICE GROSS

returned to the stand.

THE COURT. Of course, you continue to be under oath, Mrs. Gross.

791 THE WITNESS. Yes, sir.

THE COURT. All right, let us start now. And this is the tape of what date, Mr. Sullivan?

MR. SULLIVAN. A tape, Your Honor, of July 24, 1963.

THE COURT. July 24, 1963. And were there two telephone

Bernice Gross - Cross Examination

conversations?

MR. SULLIVAN. That is correct, Your Honor -- one placed by Mrs. Gross to Sergeant Wallace, and one thereafter received by Mrs. Gross from Sergeant Wallace.

THE COURT. On the same day?

MR. SULLIVAN. Yes, Your Honor, just separated by a few moments.

THE COURT. And they are on the same tape?

MR. SULLIVAN. Yes, Your Honor; they are all on one tape.

THE COURT. And you will let us know when one conversation ends and the other starts.

MR. SULLIVAN. Yes, Your Honor, I will.

THE COURT. Thank you, sir. You may start now. .

MR. SULLIVAN. Your Honor, if you will indulge me a moment, it will be necessary to find the spot on the tape.

THE COURT. All right, sir.

(The tape was played to the extent as transcribed at the bottom of page 365 in the proceedings of April 21, 1964, in this case.)

792 THE COURT. Stop that a second.

That is your voice, Mrs. Gross?

THE WITNESS. Yes, sir; it is.

THE COURT. Very well.

Gentlemen, I am putting it in pencil, on page 365 of the Court's copy of the official transcript of proceedings in the first trial of this case, a "G" in front of the "Voice." And that will be known,

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please, as Mrs. Gross' voice.

I think, Mr. Sullivan, you are going to have to be prepared for that throughout. So you may have to stop after every change of voice. Very well, you may carry on.

(The playing was resumed as appears in the first three lines on page 366 of said transcript.)

THE COURT. That is your voice, is it, Mrs. Gross?

THE WITNESS. "Homicide Squad."

THE COURT. Up to that point of "Homicide Squad." Very well.

And what is the next word after "Homicide Squad," Mr. Sullivan? Mrs. Gross said it was up to and including the words "Homicide Squad" was her voice. Very well.

(The playing was resumed as appears in the fourth line on page 366 of said transcript.)

THE COURT. Now, whose voice is the "Okay?"

Is that your voice?

793 THE WITNESS. No; that must have been the Homicide, somebody in the Homicide Squad.

MR. LAUGHLIN. I didn't hear the witness' response, Your Honor.

THE COURT. She said it was not her voice; that it must have been somebody in the Homicide.

It is not Mr. Wallace's voice?

THE WITNESS. No, it is not.

THE COURT. Very well.

Bernice Gross - Cross Examination

(The playing was resumed as appears in lines 5 and 6 on page 366 of said transcript.)

THE COURT. Stop it. Is that your voice, Mrs. Gross?

THE WITNESS. It sounded like it.

(The playing was resumed as appears in lines 7 and 8 on page 366 of said transcript.)

THE WITNESS: That's my voice.

THE COURT. Very well.

(The playing was resumed as appears in line 11.)

THE WITNESS. That was the Homicide Squad answering the operator.

THE COURT. That was, "Well, all right, thank you," as I get it. Is that right? Is that what everybody got? -- "Well, all right, thank you" -- not Mrs. Gross' voice, and not Mr. Wallace's voice?

974 MR. LAUGHLIN. I understand that, Your Honor.

THE COURT. Very well.

(The playing was resumed as appears in lines 12, 13, 14 and 15.)

THE WITNESS. That's my voice.

THE COURT. Mrs. Gross' voice.

(The playing was resumed beyond what appears in line 15.)

THE COURT. Just a moment. I've got a --

MR. LOWTHER. Page 368, Your Honor.

THE COURT. What was the last word or two spoken there? I'm trying to find the place.

MR. SULLIVAN. Shall I replay it, Your Honor?

THE COURT. If you will, sir.

(The playing was repeated through what appears in lines 14 and 15.)

Bernice Gross - Cross Examination

THE WITNESS. I asked for the charges on it. I wanted the charges. I don't know if that's written.

THE COURT. That is not in the transcript, as I see it, that particular part. As I understand it -- turn it off just a second, Mr. Sullivan -- as I understand it, Mrs. Gross has just said that there is a statement in there that "I want the charges on it," which does not appear in my transcript,

795 gentlemen, on page 366.

MR. LAUGHLIN. No, it doesn't -- nor mine, Your Honor.

THE COURT. But that was her voice, in any event, when she said, "and I want the charges on it." So we will understand that.

All right, Mr. Sullivan.

(The playing was resumed as appears in line 1 and 2 on page 368.)

THE COURT. "Hello -- hello, how are you?" -- Mrs. Gross?

THE WITNESS. Right.

THE COURT. The voice, "Fine; you?" -- Mr. Wallace?

THE WITNESS. Yes, sir.

THE COURT. Very well. In front of the "Voice" on 368, the first one, I am putting "G" for Mrs. Gross, and the next line "W" for Wallace.

MR. LAUGHLIN. Do I understand, then, Your Honor, that the voice at the very top, "Hello -- hello, how are you?," is the voice of Mrs. Gross?

THE COURT. That's right.

Bernice Gross - Cross Examination

MR. LAUGHLIN. And the other is the voice of Wallace?

THE COURT. That is my understanding, and it is Mrs. Gross' testimony.

796 (The playing was resumed as appears in lines 3 and 4 on page 368.)

THE WITNESS. That's my voice.

THE COURT. Mrs. Gross' voice; very well.

MR. SULLIVAN. If Your Honor please, in order not to miss a word, I must reverse it just a slight bit.

THE COURT. That's all right, Mr. Sullivan. You understand what we are trying to do. Every time we get a change in there, we want to know whose voice it is. That's what we are really going after here today.

(The playing was resumed as appears in lines 5 and 6 on page 368.)

THE COURT. "What's wrong? Where are you at?"

THE WITNESS. "What's wrong? Where are you?"

"I'm home." The "I'm home" is my voice; and the male is Mr. Wallace. I don't know if that's in there.

THE COURT. The transcript has it, "What's wrong? Where are you at?" That, anyhow, is Mr. Wallace?

THE WITNESS. Mr. Wallace.

THE COURT. And then, "I am home," --

THE WITNESS. That's mine.

THE COURT. And I think there are a couple of more words to be said there.

Bernice Gross - Cross Examination

(The playing was repeated through line 6, page 368.)

797 THE COURT. That's you, Mrs. Gross -- "I am home, still home."

THE WITNESS. Yes, sir.

THE COURT. There was some voice in the background that I couldn't get. I don't know whether you gentlemen got it or not. But I assume it was Mr. Wallace saying something.

MR. LAUGHLIN. It wasn't audible, Your Honor. I couldn't get it.

THE COURT. That's right. It was not audible, sir; that's right. I couldn't get it. I think the next line is going to be audible to us.

(The playing was repeated through line 9, page 368.)

THE COURT. Stop there, please.

"Oh, good," that was Mr. Wallace?

THE WITNESS. "How's everything home?" And he said, "Oh, good." I believe that is what was said. That was me.

THE COURT. Well, I think you had better play it back, because the transcript here reads, "Voice: I am home, still home," and then another voice, "Oh, good."

(The playing was repeated through line 7, page 368.)

THE COURT. The "Oh, good" is Mr. Wallace. Very well.

(The playing was repeated through line 9, page 368.)

798 THE COURT. "How is everything going?" -- Mrs. Gross. "Fine" -- Mr. Wallace.

(The playing was resumed as appears in lines 10 and 11 on page 368.)

Bernice Gross - Cross Examination

THE COURT. "Listen, I got a call from Sullivan" -- Mrs. Gross. And "Yeah," although it says here "Yes," that was Mr. Wallace.

THE WITNESS. Right.

THE COURT. Very well.

(The playing was resumed as appears in lines 10 to 14 on page 368.)

THE COURT. Just a minute. This is "What is this," and then a couple of dashes here; "says he heard," and a couple of dashes; "what's this about this meeting, he says something he heard to me about a meeting with Laughlin."

That is your voice, is it, Mrs. Gross?

THE WITNESS. Yes, sir.

THE COURT. There is a part in there, gentlemen. I don't know whether we can pick it up. There is something missing, as far as this transcript is concerned.

MR. LAUGHLIN. There was.

THE COURT. See if we can get it, again.

MR. LAUGHLIN. Your Honor, I wonder if that part, we could have that played over. There was something.

799 THE COURT. We are going to have it played over, right now, Mr. Laughlin. The thing is, I think it is going to be a little difficult; but we will listen.

(The playing was repeated from line 12 through line 16, on page 368.)

THE COURT. I think in essence we've got it here, Mr. Laughlin.

Bernice Gross - Cross Examination

MR. LAUGHLIN. I would agree, Your Honor.

THE COURT. Do you, too, Mr. Garber?

MR. GARBER. Yes, Your Honor.

THE COURT. And you, Mr. Lowther?

MR. LOWTHER. Yes, sir.

THE COURT. "What is this -- says he heard -- what's this about this meeting, he says something he heard to me about a meeting with Laughlin. Did you tell him anything?" That's Mrs. Gross.

THE WITNESS. Yes, sir.

THE COURT. Very well. And would you pick that up again please.

(The playing was repeated as appears on lines 14, 15, and 16 of page 368.)

THE COURT. The "I don't know anything about it" is Mr. Wallace. But there is, in between, a voice I hear that says, "Yeah, that's right." Would you play that again, sir.

800 MR. SULLIVAN. Surely, Your Honor.

(The playing was resumed as appears in lines 10 through 14 on page 368.)

THE COURT. There is, gentlemen, missing from this transcript a statement by Mr. Wallace, "Yeah, that's right." All right we will put that in at page 368, "Yeah, that's right," following Mrs. Gross' statement, "to me about a meeting with Laughlin."

Now pick it up again, please, Mr. Sullivan. I think we are going to have to exercise great patience. This is not going to be done in an hour, the way we are going. But I know of no other way to get this

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transcript straightened out.

MR. LAUGHLIN. I agree with Your Honor.

(The playing was resumed, apparently for several lines.)

THE COURT. Let's try it again, Mr. Sullivan. I frankly can't get it. Let's see if we can get it again. We are picking up now, sir, after Mr. Wallace says, "I don't know anything about it."

(The playing was resumed, beginning in line 13 on page 368 and continuing for what would be several lines.)

THE COURT. Stop it, please. There is something in between, looking at page 368 of the transcript of the first trial. There is  
801 something in between Wallace's voice, "I don't know anything about it." He then says something, gentlemen, that as far as I am concerned is inaudible. Is it inaudible to you gentlemen?

MR. LAUGHLIN. I couldn't get it.

MR. GARBER. Yes, sir.

THE COURT. Mr. Lowther, is it inaudible to you?

Mr. Lowther. Yes, sir.

THE COURT. Very well. Then, "What do you mean, he didn't." And then there is something else in there about Acheson, --

MR. LAUGHLIN. Yes.

THE COURT. --by the voice, Wallace. And then Mrs. Gross comes in with "Acheson."

Very well. Let's try that part of it again.

MR. LAUGHLIN. Your Honor, I would like to make an

Bernice Gross - Cross Examination

observation. It was played twice. And where it says, "What is this -- says he heard -- what's this about this meeting. He says something he heard to me about a meeting." Then there was some hesitation before the word came in, "with Laughlin." Did Your Honor detect that?

THE COURT. No, sir; I did not. I detected "to me about a meeting with Laughlin." And then a voice comes in, which we say is Wallace's, "Yeah, that's right." And then Mrs. Gross says, "Did you  
802 tell him anything?"

MR. LAUGHLIN. Yes. But the point I make, though, on that, Your Honor -- and I have a reason for saying that to you -- "about a meeting," and then there's a hesitation; then the words, "with Laughlin."

THE COURT. Try it again, Mr. Sullivan.

(The playing was repeated, from line 12 to line 14.)

THE COURT. If you mean, sir, "What's this about a meeting," and "he said something to me about a meeting, with Laughlin," yes, there is part of a second, if that's what you mean, a pause.

MR. LAUGHLIN. All right, sir.

THE COURT. All right. Let's carry on.

(The playing was resumed.)

THE COURT. Just a minute. Stop it there, Mr. Sullivan.

Gentlemen, I can do nothing more than what the reporter did at the first trial. There is something in before this. I do hear, I believe, Mrs. Gross, your voice saying, "What you mean, he didn't," and then, "from Acheson." Isn't that right?

THE WITNESS. Yes, sir.

THE COURT. Now can any of you make out any better than that?

Bernice Gross - Cross Examination

803 MR. LAUGHLIN. I agree.

MR. GARBER. I certainly couldn't.

THE COURT. Mr. Lowther, can you make it out any better than that?

MR. LOWTHER. No, Y<sup>O</sup>ur Honor.

THE COURT. Very well. That is Mrs. Gross' voice saying, "What do you mean, he didn't -- from Acheson." Very well. Go ahead, sir.

(The playing was resumed, through line 20.)

THE COURT. Stop there, please. The reporter at the first trial could hear better than I did. He got a voice, "He is," and then we have your voice coming, Mrs. Gross, saying "He is a friend of who?"

THE WITNESS. Yes, sir.

THE COURT. Then I assume that that "He is," or whatever it was, was Wallace's.

All right. Go ahead, Mr. Sullivan.

(The playing was resumed.)

THE COURT. Just a minute, please. I don't get this in here. There is something in there, "Where does he work," that doesn't appear in my transcript, gentlemen. The reason it probably is not in the transcript is because right after Mrs. Gross said "He is a friend of who," Mr. Laughlin, at the time of running the tape, said, "Any way it can be  
804 turned up?" And I assume the reporter was taking that and missed whatever was in there. But there is a statement in there, "where does he work?"

Would you play it again, please.

MR. SULLIVAN. Surely, Your Honor.

Bernice Gross - Cross Examination

(The playing was resumed, "Where does he work?")

THE COURT. Just a minute. "Where does he work?" Do we all agree on that?

MR. LAUGHLIN. Yes, sir. MR. GARBER. Yes, sir.

THE COURT. And that is your voice, is it not, Mrs. Gross?

THE WITNESS. Yes, sir.

THE COURT. "Where does he work?" All right. Go ahead.

(The playing was resumed, as appears in lines 22 and 23.)

THE COURT. Just a minute. The "I don't even know whether he knew about it" is your voice, Mrs. Gross?

THE WITNESS. Yes, sir.

THE COURT. All right, Mr. Sullivan.

(The playing was resumed.)

805 THE COURT. Just a minute. "Well, now, from what I gather, Forte told"--and that's Mr. Wallace's voice--was it? Play it again, please.

(The playing was repeated, as appears in lines 22, 23 and 24.)

THE COURT. All right. That's Mr. Wallace's voice?

THE WITNESS. Yes, sir.

THE COURT. "Well, now, from what I gather, Forte told"--all right.

MR. GARBER. I caught the word "Duncan," Your Honor, also.

THE COURT. Oh, did you, sir?

MR. GARBER. Yes. It seemed to be, "from what I gather,

Bernice Gross - Cross Examination

Forte told Duncan."

THE COURT. Well, we will have to play it over again, then.  
Let's see if we can get it in there.

(The playing of the bottom line was repeated.)

THE COURT. I got it too. Do you get it, Mr. Lowther,  
"Forte told Duncan?"

MR. LOWTHER. Yes, sir.

THE COURT. All right. On page 368 of the transcript  
of the first trial, after the words "Forte told," there is going to be the  
word "Duncan" added, for our purposes here. All right.

806 (The playing was resumed and went to the third line on  
page 369.)

THE COURT. Mrs. Gross, that is your voice, "Forte, I  
don't even know -- well, Forte must have known that I met him, but he  
didn't know where," that was your voice?

THE WITNESS. Yes, sir.

THE COURT. Something then comes in, gentlemen, at  
that point, and it's not transcribed here; but let's see if we can pick it  
up.

(The playing was repeated, through the first four  
lines on page 369.)

THE COURT. Stop it, please.

Gentlemen, can anybody pick up what that is in between?

MR. GARBER. I just got one word, Your Honor --  
"Duncan" again. It was a male voice; but the only word I could get  
was "Duncan."

Bernice Gross - Cross Examination

THE COURT. Let's have it again and see if we can't get that.

(The playing through the first four lines on page 369 was repeated.)

THE COURT. Stop it, please. I think there is the word "Duncan" in there; but it's just hanging loose, as far as my --

807 MR. GARBER. I could catch nothing else.

THE COURT. Did you get anything else, Mr. Lowther?

MR. LOWTHER. I did not, except it was a male voice.

THE COURT. A male voice, and the word "Duncan" came in, with other words inaudible; is that correct, gentlemen?

MR. LAUGHLIN. Yes, Your Honor.

THE COURT. All right. Go ahead, Mr. Sullivan.

(The playing was resumed apparently through line 7 on page 369.)

THE COURT. I'm afraid you went a little too fast for us, Mr. Sullivan.

Mrs. Gross, you heard the words, "Forte, I don't even know -- well, Forte must have known that I met him, but he didn't know where," and then something coming in, and then "because he tells me everything that I had said to you," Those are your words?

THE WITNESS. Yes.

THE COURT. Very well. Now pick up from there, Mr. Sullivan.

MR. SULLIVAN. Yes, sir.

(The playing was resumed, from line 3 to line 6 on page 369.)

Bernice Gross - Cross Examination

THE COURT. That's Mr. Wallace's voice?

THE WITNESS. Yes, sir.

808 THE COURT. Very well.

(The playing was resumed, apparently the 7th line.)

THE COURT. "The first thing" --

THE WITNESS. That was my voice.

THE COURT. "The first thing that I heard" is transcribed here. Do you gentlemen get anything besides that?

MR. LAUGHLIN. I did not, Your Honor.

MR. GARBER. I didn't.

THE COURT. Mr. Lowther?

MR. LOWTHER. No, sir.

THE COURT. Very well. We will carry on from there.

(The playing was resumed, to the 9th line.)

MR. GARBER. Your Honor, I got in there, after "somebody else," I believe, "That's all right." It was a male voice. It doesn't appear in this transcript. Then the male voice cut in again.

THE COURT. There was a male voice in the background. Let's go to that again, Mr. Sullivan, the "I tell you" something.

(The playing was resumed, at lines 8 and 9.)

THE COURT. The voice that is audible to me is Mrs. Gross' voice. Is that right?

THE WITNESS. Yes, sir.

THE COURT. Gentlemen, I cannot get the background voice.

809 MR. GARBER. Your Honor, the only thing I got was "Somebody had to." And I think I got the word, the phrase, "nobody else," a

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male voice.

THE COURT. Did you get something like that, Mr. Laughlin?

MR. LAUGHLIN. No, Your Honor, I didn't. Mr. Garber got that; but I didn't get any more than what appears here.

THE COURT. Mr. Lowther, did you get anything?

MR. LOWTHER. I did not.

THE COURT. Is it material, gentlemen? Is it material on this particular part, what's in the background?

MR. GARBER. I don't really think so.

MR. LAUGHLIN. I don't really think, Your Honor, it's --

MR. GARBER. I was just trying to --

THE COURT. Well, we'll leave the transcript where it says, "I tell you this cost me \$5 -- he said nobody else -- Dottie, and Dottie's not going to tell," that that is Mrs. Gross' voice. Everybody agrees, I'm sure, on that. Very well.

(The playing was resumed, apparently to line 15.)

THE COURT. Stop it, please.

810 "Well, I told Sullivan tonight I didn't know anything about it and he wanted to come over tonight, but he's going to bring you" -- that was your voice, Mrs. Gross?

THE WITNESS. Yes, sir.

THE COURT. The transcript has something before it which reads here, "That's right, but what I say about it, he said he's going to come over and see." I frankly didn't get that. Did you, gentlemen?

MR. GARBER. No, Your Honor.

MR. LAUGHLIN. No, I didn't either, Your Honor.

Bernice Gross - Cross Examination

THE COURT: Did you, Mr. Lowther?

MR. LOWTHER. No, sir.

THE COURT. Well, I guess that reporter has better ears than any of us have. But anyhow it's in there, and I don't know who it is.

Very well. Continue on, Mr. Sullivan.

(The playing was resumed, lines 15 and 16.)

THE COURT. All right, let's stop it. That's Mrs. Gross; isn't that right?

THE WITNESS. Yes, it is.

THE COURT. Very well. Carry on.

(The playing was resumed, through line 18.)

THE COURT. "Not that it means anything, I mean" -- that's Mrs. Gross?

THE WITNESS. Yes, sir.

811 THE COURT. Now there's an "Oh" in there that the reporter heard. I didn't get it. All right, go ahead.

(The playing was resumed, lines 18 through 20.)

THE COURT. Mrs. Gross, that's your voice?

THE WITNESS. Yes, sir.

THE COURT. Very well.

(The playing was resumed, lines 21 and 22.)

THE COURT. All right, stop it. That's Mrs. Gross' voice.

THE WITNESS. Yes, sir.

THE COURT. Very well. Carry on.

(The playing was resumed, through line 23.)

Bernice Gross - Cross Examination

THE COURT. That is Mr. Wallace's voice, "I don't see where it had any bearing?"

THE WITNESS. Yes, sir.

THE COURT. All right.

(The playing was resumed, through the first line on page 370.)

THE COURT. That is Mrs. Gross' voice.

THE WITNESS. Yes, sir.

THE COURT. There is lacking in the transcript, on page 369, after the words "I didn't," the last words on the page, the word "any" -- well, what was the word? I have forgotten it already.

812 MR. LOWTHER. "Either," I think.

THE COURT. Well, try it again.

MR. GARBER. It appears on page 370, Your Honor.

MR. LAUGHLIN. Yes. On 369, the last I have at the bottom, it says, "I didn't."

THE COURT. All right. Try that again, Mr. Sullivan.

(The playing was repeated, to the 2nd line, page 370.)

THE COURT. All right. Stop it, Mr. Sullivan. "I didn't, either," it appears on the top of page 370. I didn't get the "I didn't," on the bottom of page 369. Did any of you gentlemen?

MR. GARBER. No, sir.

THE COURT. There's only one "I didn't" in there, that I could hear, and that's the "I didn't, either" by Mrs. Gross. Is that correct?

MR. LOWTHER. Yes, Your Honor.

Bernice Gross - Cross Examination

THE COURT. Very well.

(The playing was resumed, apparently through the fourth line, page 370.)

THE COURT. Now, before that, I wish you would go back to that male voice -- which appears to be a male voice, Mr. Sullivan -- where "like I told Sullivan." There's something before there. We have a transcript here, and I want to hear it.

813 (The playing was repeated, through line 4.)

THE COURT. The "Who" is your voice, isn't it, Mrs. Gross?

THE WITNESS. Yes, sir.

THE COURT. Now, the voice before that was Mr. Wallace's?

THE WITNESS. Yes, sir.

THE COURT. Now, gentlemen, I, like the reporter at the first trial, get nothing audible to me, although there are some words after the words "like I told Sullivan." Did anybody else get anything?

MR. LAUGHLIN. No, Your Honor.

MR. GARBER. No, Your Honor.

THE COURT. Did you, Mr. Lowther?

MR. LOWTHER. No, Your Honor.

THE COURT. Very well. We will continue on. The "Who" is Mrs. Gross -- and then from there.

(The playing of the recording was resumed.)

THE COURT. The transcript here is:

"Laughlin and Forte; so I asked Sullivan, 'Well, who told' -- he said -- shall I tell him --"

That was Mr. Wallace's voice, I assume.

Bernice Gross - Cross Examination

THE WITNESS. Yes, sir.

814 THE COURT. Now there are some words in there after wards,  
or some sounds, at least, that are inaudible to me. Does anybody have anything?

MR. GARBER. I believe I got the name "Acheson."

THE COURT. Very well; we will try it again.

(The recording was replayed, beginning with line 4,  
page 370.)

THE COURT. Acheson's name is in there somewhere; but it has no connection that I can get.

Mr. Lowther, do you agree that the word "Acheson" is in there?

MR. LOWTHER. I will agree; but it has no meaning.

THE COURT. Yes, because what's before and what's after it doesn't convey anything.

Does it to you, gentlemen?

MR. LAUGHLIN. I don't think it's material, Your Honor.

THE COURT. Mr. Garber?

MR. GARBER. No, Your Honor; I couldn't get anything out of it.

THE COURT. Then the words we do have, that the reporter got at the first trial:

"Voice: Laughlin and Forte; so I asked Sullivan,  
'Well, who told' -- he said -- shall I tell him" -- Mr. Wallace's voice.  
All right, sir.

815 (The playing was resumed, apparently lines 7 and 8.)

Bernice Gross - Cross Examination

THE COURT. Mrs. Gross, that was your voice?

THE WITNESS. Yes, sir.

THE COURT. All right.

(The playing was resumed for several lines.)

THE COURT. There is much in there between the transcript which says, "Yes, but I mean, it was Forte going against Laughlin," which is Mrs. Gross' voice, and the next voice starting, "That is what I heard," which is Mr. Wallace's voice, --

THE WITNESS. Yes.

THE COURT. --from that time on there is much in there that I cannot get, gentlemen. I did hear the name Laughlin once; but it didn't tie up to anything to mean anything of any significance to me.

Now the next thing I do get is what the reporter got at the time of the first trial in the recording, where the voice comes in, "I don't know, I just don't know," which I believe is Mrs. Gross'.

Now, gentlemen, do you have any difference with me on this?

MR. GARBER. No, Your Honor.

MR. LAUGHLIN. No, Your Honor.

816 THE COURT. Very well, it's Mrs. Gross' voice.

All right; now pick that up again, if you will, please.

(The playing of the recording was resumed.)

THE COURT. I didn't even get this, "and I told Acheson."  
Did either of you?

MR. GARBER. I heard it, Your Honor.

THE COURT. Whose voice is it, as you understand it?

MR. GARBER. As I understand it, it was Mrs. Gross' voice.

Bernice Gross - Cross Examination

THE COURT. Did you hear it?

THE WITNESS. No, I didn't.

THE COURT. Did you hear it, Mr. Lowther?

MR. LOWTHER. No, sir.

THE COURT. Try it again, Mr. Sullivan.

MR. GARBER. It flitted in there very quickly.

THE COURT. All right. Try it again, please.

(The playing was resumed.)

THE COURT. It's earlier than that, Mr. Sullivan.

MR. GARBER. It is.

THE COURT. Go back a little bit, please.

(The playing of the recording was repeated,  
apparently to line 17, page 370.)

817 THE COURT. I think, gentlemen, the only sense I can get out of this thing is after Wallace's voice said, "That is what I heard," and the next thing that is audible to me that makes any sense is Mrs. Gross' voice just coming in now, "I think they asked me -- after I went in for the first time." Now is there anything that any of you can get besides that out of it?

MR. GARBER. Not at that particular portion, Your Honor.

MR. LAUGHLIN. No, Your Honor.

THE COURT. And you, Mr. Lowther?

MR. LOWTHER. No, Your Honor.

THE COURT. Very well. I'm even going to strike that "G" that I have in front of the "Voice: I don't know, I just don't know," because, hearing it again, I don't either.

Bernice Gross - Cross Examination

Picking it up, all right, now, Mr. Sullivan, "I think they asked me."

(The playing was resumed, apparently through line 22, page 370.)

THE COURT. All right, stop it, please.

That's Mrs. Gross; that's you, isn't it?

THE WITNESS: Yes.

THE COURT. Very well. Now what was Mr. Wallace saying? I think it was probably Wallace.

818 (The playing was resumed, through line 23.)

THE COURT. Mr. Wallace, "What did Sullivan say" --

THE WITNESS. Yes, sir.

THE COURT. Very well. Go ahead, please.

(The playing was resumed, through the first four lines on page 371.)

THE COURT. Mrs. Gross, what I heard there was your voice, except in the background there was Mr. Wallace's voice; is that right?

THE WITNESS. Yes, sir.

THE COURT. Gentlemen, I got nothing more than the reporter got out of that.

MR. LAUGHLIN. I do not, either.

THE COURT. If anybody does, gentlemen, speak up, because I think it's going to take an awful lot of time on this, anyhow.

All right, that's Mrs. Gross' voice at the end of page 370 over to and including, "My father is here, and I don't want to put my

Bernice Gross - Cross Examination

father through anything."

All right, carry on, Mr. Sullivan.

(The playing was resumed and continued through  
line 12, page 371.)

THE COURT. Where are we going here? Stop that thing.  
I'm completely lost. I was trying to pick up where Mrs. Gross said,  
819 "My father is here, and I don't want to put my father through  
anything." We've got to start from that point, Mr. Sullivan.

MR. SULLIVAN. Yes, Your Honor. That's what we did,  
but --

THE COURT. Did we? Well, I lost it, I guess.

Well, I'll tell you one thing -- we're going to stop for a few  
minutes. I wish I hadn't called this jury back today. I can see we have  
plenty of work ahead, gentlemen.

MR. LAUGHLIN. My thought is, Your Honor, that the jury  
should be excused until Monday, because Your Honor may give consid-  
eration -- I don't know that that will arise -- but as long as we have the  
machine here, and Mr. Sullivan, you may want to consider whether  
other than the Wallace-Gross, whether you may want any other tapes  
played. I don't know that that will arise.

THE COURT. I don't want any more than I am going to have  
to hear. And I am only going to have to hear it if you raise something  
in your cross-examination, because I am assuming the Government is  
not going to put in any tapes of any kind.

Is there any way that counsel for the government and coun-  
sel for the defendants can sit down and go through this and agree who said

Bernice Gross - Cross Examination

what, instead of going through this torture of listening to that thing?

820 MR. LAUGHLIN. I know it is.

THE COURT. Gentlemen, don't misunderstand me. I'm willing to sit here throughout this whole thing. But if you can meet and work out something; and what you can't work out, then we can play that part of it. Maybe we can expedite it. It seems to me we are in for a long, long hearing. Do you want to try it, or not?

MR. LAUGHLIN. Let me confer with Mr. Garber for a moment, Your Honor.

(Having conferred:)

Your Honor, certainly, I am willing to undertake anything, because in this it's conceded, Your Honor, that the female voice is the witness, Mrs. Gross, and the male voice is Wallace. So in view of that, as Mr. Garber said, I don't see how we can get anything more than the reporter got.

THE COURT. I think the problem, you see, if the reporter had stated, as he went along, "Female voice," "Male voice," "Female voice," "Male voice," we then would have had much less trouble. But all we have is "Voice," "Voice," "Voice."

MR. LAUGHLIN. Yes.

THE COURT. And I frankly, when I read this over day before yesterday, it was just voices to me, and I couldn't tell whose voice was  
821 saying what.

The question I raise with you gentlemen, without having to listen to this whole thing, if counsel for the government and counsel for the defendants could sit down and say, "Well, we agree that this line is

Bernice Gross - Cross Examination

the Gross voice, this line is the Wallace voice," and when you run into a problem and can't agree, then why shouldn't I come out and hear that part of it? It may be there would be very little that there would be any disagreement about. It may be the whole thing will be disagreed to. But I would think that probably you could expedite everything if you will give consideration to that.

MR. LAUGHLIN. Yes.

THE COURT. What do you think of it, Mr. Lowther?

MR. LOWTHER. Very well, Your Honor.

MR. LAUGHLIN. Your Honor, what I would be agreeable, possibly even without the use of the machine, we could take the transcript, and it may be, since we do have the benefit of Mrs. Gross' presence here today, and if she will point out that such and such was her --

THE COURT. I am not going to ask her to do that, sir.

MR. LAUGHLIN. Oh, you're not?

THE COURT. I think that is unfair to this witness, because  
822 this is a garbled piece of literature at its best, and I think you gentlemen who have heard this -- and you know pretty much what has been said -- have got yourselves to get together and agree, if you can, as to who said this and who said that. And what you can't agree to, then Mr. Sullivan will turn on the tape to that part, the Court will listen, and if you can work out an agreement then among the three of you, it will be worked out; otherwise the Court will rule on whose voice it is.

MR. LAUGHLIN. Well, I'm certainly willing to try.

MR. GARBER. I have this suggestion, Your Honor, which might expedite the thing: If first we could hear the entire tape through

Bernice Gross - Cross Examination

uninterrupted, and then go back over the transcript. That may help.

THE COURT. All right. In other words, counsel?

MR. GARBER. Yes.

THE COURT. I will do what Judge Hart did; I will stay in chambers, and you call me when you have trouble. I think that is the best way to do it. Counsel will sit down, while Mr. Sullivan is here, and go through the whole thing. You won't need the reporter at this time, --

MR. LAUGHLIN. Oh no. This must be burdensome for him.

THE COURT. And you agree with that, Mr. Lowther?

823 MR. LOWTHER. Yes, sir.

THE COURT. As I understand Mr. Garber's suggestion, it is that counsel just sit down and listen to the tape as a whole. Then I assume Mr. Garber would say, "Now let's turn to the transcript of the first trial and see if we can agree, having heard the tape as a whole, who said what." And when you can't agree, you will then call on the Court to come in and hear those portions, and let the Court rule if you still don't agree.

MR. GARBER. Yes. I think we would have to hear the tape. I doubt if any of us can remember it.

THE COURT. I think probably there is much to be said for that, Mr. Garber, and I'm going to let you do it, gentlemen. I will stay in chambers. But I am wondering what we are going to do with this jury. You see, we are going to sit only until ten minutes of three this afternoon, because my secretary got a call yesterday from the Court of General Sessions. They have you down for three o'clock, Mr. Laughlin.

Bernice Gross - Cross Examination

MR. LAUGHLIN. Yes, sir.

THE COURT. And I suppose you will have time to get over there, if you leave here at ten minutes of three.

It is now getting up to 11:30, and I am satisfied we will not get this thing resolved before the noon hour.

824 MR. LAUGHLIN. I would suggest the jury be excused until Monday, Your Honor.

THE COURT. What do you think, Mr. Lowther?

MR. LOWTHER. I guess it will have to be done, Your Honor.

THE COURT. Mr. Garber?

MR. GARBER. I'm in agreement. It seems to me, since it has taken an hour to progress this far, I don't think --

THE COURT. I don't like to have a jury -- and they are being penned up there in that jury room.

MR. LAUGHLIN. That's right.

THE COURT. And juries, like everybody else, can get a little bit irked by just sitting and looking at four walls. If we are not going to use them, we might as well send them home.

MR. LAUGHLIN. I would agree with that, Your Honor.

THE COURT. And you will have to get that machine out of here so I can have them come out and tell them to go home. I am not going to let them come out here and see a machine on that table. I will send them home now. Get the machine out of the way and we will bring them in.

MR. SULLIVAN. Yes, Your Honor.

THE COURT. And, Mrs. Gross, I think if you went to the witness room for the time being.

Bernice Gross - Cross Examination

825           (The witness, Bernice Gross, accordingly left the courtroom.)

THE COURT. Are you in the clear, Mr. Sullivan --

MR. SULLIVAN. Yes, Your Honor.

THE COURT. --as far as any evidence is concerned of any tape listening? The jury will not notice it? Everything is out of the road?

MR. SULLIVAN. Everything is out, Your Honor.

THE COURT. Very well. Bring them in.

(The jury is now in the box.)

THE COURT. Good morning, ladies and gentlemen. I'm sorry I wasn't as aware last night as I am now of how much of a problem we have here today, because you could have been starting your weekend last evening. As it is right now, I am going to have to let you go home. There is no sense in having you sit around here the rest of the day, as it looks like you would have to, in that jury room. You might as well go out and have a longer weekend rather than a shorter one. So I am going to have you go home and come back at ten o'clock Monday morning.

You will bear in mind, please, the admonition I've given to you. You will not speak to anyone, no one will speak to you, and you may not even speak among yourselves about this case. And when I say no one will speak to you, you can't even speak among the members of your

826           family about this case. You may not read about the case, you may not listen over radio or TV about the case. Please bear that in mind. And if anybody attempts to talk to you, get in touch with me.

Have a nice weekend.

(Accordingly at 11:28 p.m. the jury was excused and left the courtroom.)

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THE COURT. Well, gentlemen, I am going to leave you here, and you try to work it out. I am not going to have the reporter stay. If, as and when you come to something you cannot agree on and have to listen to the tape, the reporter and I will come back, the clerk will come back, and we will listen to that part of the tape, and the Court will make a ruling. I am hoping that by consideration of counsel on both sides that most of it will be handled in that way. I don't know whether it can be. I wouldn't even venture a guess. But do the best you can. I will be in chambers.

MR. LAUGHLIN. Your Honor, the other day you asked a question about prayers. I will be able to have some for you this afternoon. I won't have them all, because the evidence isn't all in.

THE COURT. Well, you have a pretty good visualization of what the evidence is going to be, because you have been through this once. You can move along -- and you, too, Mr. Garber.

827 MR. GARBER. Yes, sir.

THE COURT. All right. I'll be in chambers, waiting to return.

(Accordingly at 11:30 a.m. the recess was taken until return of the Court.)

\* \* \*

(At 12:30 p.m. the following proceedings were had, the jury not being in the courtroom, having been previously excused to return Monday morning, June 14, 1965:)

MR. LOWTHER. If Your Honor pleases, in regard to the transcripts, I think it would be helpful if I made this statement to the Court.

THE COURT. Yes, Mr. Lowther.

MR. LOWTHER. Before Your Honor left the bench, we had

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arrived at a point at the top of page 371, where the voice, "My father is here, and I don't want to put my father through anything," it was agreed that that was Mrs. Gross' voice.

THE COURT. Yes, sir.

MR. LOWTHER. The next series of voices --

"I called, you know --

"Well, I don't know, but --

"As far as I know, I don't know anything --

828 "I just thought I was so sure it was you."

"What for?" --

I got nothing out of it, and I don't think defendants got anything out of it.

That is the agreement that I understand to be made.

THE COURT. Is that correct, gentlemen?

MR. GARBER. Correct, Your Honor.

THE COURT. In other words, we don't credit the voice --

"I called, you know --

"Well, I don't know, but --

"As far as I know, I don't know anything --

"I just thought I was so sure it was you.

"What for?"

-- we don't credit that to anybody?

MR. GARBER. No, Your Honor.

THE COURT. Very well.

MR. LOWTHER. The voice --

"Well, Forte knew, Forte knew because Forte called me from his office, said he was going to come in with me -- "

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-- Mrs. Gross.

THE COURT. That's agreeable to everybody?

MR. GARBER. It is, Your Honor.

829 THE COURT. Very well.

MR. LOWTHER. The voice, "At the store. See, at that time I was working full time, two nights a week," Mrs. Gross.

THE COURT. Agreeable to everybody?

MR. GARBER. We do.

MR. LOWTHER. The voice, "It didn't come from you," I don't have anything.

MR. GARBER. And I got nothing.

THE COURT. Mr. Laughlin, you agree?

MR. LAUGHLIN. Yes, Your Honor.

THE COURT. Very well.

MR. LOWTHER. The voice, "Well, there is a lot that I haven't testified to, if you know what I mean," Mrs. Gross.

The voice, "Well, I am not. I am not," I got Mrs. Gross; Mr. Garber got nothing; and it's not important anyhow, as I view it.

MR. LAUGHLIN. I would agree with that, Your Honor.

MR. GARBER. I would agree.

THE COURT. In other words, no credit to anybody's voice.

MR. LAUGHLIN. Yes, that's right.

THE COURT. All right.

830 MR. LOWTHER. And the voice, "Yes," I got Mrs. Gross and Mr. Garber got nothing; and I'm perfectly agreeable that it's nothing.

THE COURT. Agreeable, Mr. Garber?

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MR. GARBER. Yes, sir.

THE COURT. Agreeable, Mr. Laughlin?

MR. LAUGHLIN. Yes, sir.

THE COURT. Fine.

MR. LOWTHER. The voice, "When -- call me first -- 'cause I don't have to let him in," Mrs. Gross.

THE COURT. All right.

MR. LOWTHER. The voice, "Well, you still working on it," Mrs. Gross.

The voice, "What do you mean -- there, when I was there -- I don't know," Mrs. Gross.

The voice, "I don't know, seems to me that they have uncovered a hell of a lot of stuff" -- Mrs. Gross.

THE COURT. Now, gentlemen, just one minute. When Mr. Lowther says these, and there is no objection, I am assuming that you all are in agreement, rather than stopping to ask at each.

MR. GARBER. That's correct.

MR. LAUGHLIN. That's correct, Your Honor.

THE COURT. All right.

831 MR. LOWTHER. The voice, "As I say, I haven't heard from him in a long while because I was on vacation" -- Mrs. Gross.

The voice, "Who, Sullivan?" -- Sergeant Wallace.

The voice, "Yes," -- nothing.

The voice, "Uh-huh" -- Mrs. Gross.

The voice, "Well, the only way" -- Sergeant Wallace.

The voice, "Why in the hell they do that with Jean Smith"

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-- Mrs. Gross.

The voice, "Who's this Duncan?" -- Mrs. Gross.

The voice, "Duncan\_ -- Sergeant Wallace.

The voice, "Don't know why the guy don't," I have Mrs. Gross. I think Mr. Garber didn't get anything. But it's immaterial to me. I would put down "Nothing," as far as I am concerned.

THE COURT. Very well. It is "Nothing," then, gentlemen -- nobody's voice?

MR. LAUGHLIN. Yes, that's right.

MR. LOWTHER. The voice, "Why do they keep" -- Mrs. Gross.

The voice, "What's he, State's Attorney, or what" -- Mrs. Gross.

The voice, "Was he like Sullivan?" -- Mrs. Gross.

The voice, "Well, he's like Sullivan" -- Sergeant Wallace.

832 The voice, "Oh, he's a bum" -- now here's where we have need of a replay, if Your Honor sees fit.

THE COURT. Can we go on and come back to this point?

MR. LOWTHER. Yes indeed; yes, sir.

THE COURT. And right now I will put a check mark in front of "Oh, he's a bum."

MR. LOWTHER. And we can agree on this, Your Honor: The next two voices, it's not "he's afraid of Forte," but "and he's a friend of Forte."

MR. GARBER. That's what I get.

THE COURT. Is that agreeable?

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MR. LAUGHLIN. That's agreeable, yes, Your Honor.

THE COURT. What I am going to do on this transcript, so the record will show it here, I am writing in pencil on page 372, above the word "afraid," I am going to write "a friend." And that, of course, is not in the original transcript; but we are all agreed on it. And who said that, please?

MR. LOWTHER. And that's where we need the replay, too.

THE COURT. All right. That continues.

MR. LOWTHER. And the next one, we need a replay, except that it is agreed that instead of being "Afraid of Forte," it's "A friend of Forte."

833 THE COURT. And again I will write above this, in the transcript, "A friend."

MR. LOWTHER. Yes, Your Honor.

The voice, "Well, that's nice" -- Mrs. Gross.

The voice, "Well, I wonder, you know" -- Mrs. Gross.

The voice, "The whole case from the beginning, how did they get him" -- Mrs. Gross.

The last one on page 372, the voice, "I have no idea" -- Sergeant Wallace.

At the top of page 373, the voice, "That's what bothers me, because I know, certainly, that -- unless he was there, and once he was there -- told, but how did they know before?" -- Mrs. Gross.

The voice, "Did you know I was in on it before?" -- Mrs. Gross.

The voice, "No" -- and I have a question mark. I didn't

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get who it was.

THE COURT. Did anybody get anything?

MR. GARBER. I got Wallace. I was under the impression it was Wallace.

THE COURT. Do you want to check that?

MR. LOWTHER. I guess we had better had, then, if Your Honor please.

THE COURT. All right.

834 MR. LOWTHER. The voice, "Well, you knew when I called you" -- Mrs. Gross.

The voice, "You called me" -- Mrs. Gross.

The voice, "I called you right at the beginning -- Sullivan -- dreamed it up -- don't know -- from a hole in" -- Mrs. Gross.

The voice, "Got lot of friends -- right places" -- Mrs. Gross.

The voice, "Well, hold on a minute, give me time to get this down, will you" -- Mrs. Gross.

The voice, "I didn't even know" -- not "we" but "he" -- "I didn't even know he had a place down at the Bay."

THE COURT. I will show it in pencil in the transcript. Who was the voice?

MR. LOWTHER. Mrs. Gross, Your Honor.

The voice, "Well, I didn't know" -- Sergeant Wallace.

The voice, "Well, I'm going through, and I didn't get nothing out of it but just aggravation" -- Mrs. Gross.

The voice, "I wish the hell I did" -- Mrs. Gross.

The voice, "I don't either, because what's the difference?

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I mean, it isn't as if my life"--Mrs. Gross.

The voice, "Oh, no, I know that, but I mean"--Sergeant Wallace.

835 The voice, "I don't trust 'em, either. I don't trust any of them,  
none of you--don't trust"--Mrs. Gross.

MR. LOWTHER (continuing). Page 374, the first voice,  
"Called the other day"--Sergeant Wallace.

Voice, "Called who?"--Mrs. Gross.

Voice, "Called"--Sergeant Wallace.

Voice, "For what?"--Mrs. Gross.

Voice, "What he call you for the"--Mrs. Gross.

Voice, "Could you help it?"--Mrs. Gross.

Voice, "I could try"--Sergeant Wallace.

Voice, "You're better keeping your nose out if it"--Mrs. Gross.

Voice, "Well, all right, as long as I know it isn't you, and I hope  
it isn't, because I would feel awfully bad"--Mrs. Gross.

Voice, "Well, I don't think they are going to check any more. They  
still checking records?"--Mrs. Gross.

Voice, "What did I call you for? I can't tell them. I called you for  
this"--Mrs. Gross.

Voice, "I called you to fix a particular"--and I have a question mark  
after that. I have, myself, Sergeant Wallace; and I think counsel for the  
defendant Forte and the defendant Laughlin may have different ideas; I  
don't know.

MR. GARBER. That's correct.

THE COURT. You want to hear that, in other words?

836 MR. GARBER. Yes, I think you should hear it.

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THE COURT. "I called you to fix a particular" is going to be checked. Very well.

MR. LOWTHER. Voice, "If he can do it, I can do it, too"  
--Mrs. Gross.

Voice, "No, I don't know anything about it. I don't want 'em out here--not now when my father is here"--Mrs. Gross.

Voice, "Well, this is the third week, and probably--O.K., Sam"  
--Mrs. Gross.

Voice, "I'll be talking to you"--Sergeant Wallace.

Voice, "Right"--Mrs. Gross. And that concludes the first tape.

Going to the second tape, at page 375, the first voice, "When?"  
--Mrs. Gross.

Voice, "Will call me back?"--and I have nothing.

MR. GARBER. And I have nothing.

THE COURT. And, Mr. Laughlin, you have nothing?

MR. LAUGHLIN. Yes, I agree, Your Honor.

THE COURT. All right.

MR. LOWTHER, Voice, "Wanted to know your number"--  
Sergeant Wallace.

Voice, "--me the charges, yes, you want the bill"--Mrs. Gross.

837 Voice, "And she said no, but I will pay the bill"--Sergeant Wallace.

Voice, "Oh, no"--Mrs. Gross.

Voice, "Yes, she did. She called me and gave me the charges"--  
Mrs. Gross.

Voice, "But anyway, Sullivan--he says"--Sergeant Wallace.

Voice, "What's that noise? You got this taped?"--Mrs. Gross.

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Voice, "Well, you hear that noise" -- Mrs. Gross.

Voice, "I hear a humming" -- Sergeant Wallace.

Voice, "A humming, yes" -- Mrs. Gross.

Voice, "You want me to call you back?" -- Sergeant Wallace.

Voice, "No; if you say no, I trust you. I'm not saying nothing, anyway, so you go ahead, you do the talking" -- Mrs. Gross.

Voice, "O.K." -- Sergeant Wallace.

Voice, "I wasn't, he's a lot of crap -- well, I wasn't exactly thrilled to hear from him, either" -- Mrs. Gross.

And this is at the top of page 376.

Voice, "Yes -- yes" -- and I have "Nothing."

THE COURT. Nothing, gentlemen?

MR. LAUGHLIN. I agree.

MR. GARBER. Yes.

838 MR. LOWTHER. Voice, "That's right" -- Mrs. Gross.

Voice, "Oh, he did?" -- Mrs. Gross.

Voice, "That's right" -- Mrs. Gross.

Voice, "That's right" -- Mrs. Gross.

Voice, "What are they making a federal case out of it -- Mrs. Gross.

Voice, "I don't know why, so I" -- Sergeant Wallace.

Voice, "I'm glad you told him that" -- Mrs. Gross.

Voice, "Oh, really?" -- Mrs. Gross.

Voice, "Oh." -- Mrs. Gross.

Voice, "Oh, there was -- if I knew you were alone I would have come over and spoken to you -- I am working tomorrow" -- Mrs. Gross.

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Voice, "Listen, they get anything on you, are they on to you at all? -- You know I got" -- Mrs. Gross.

Voice, "Somebody else" -- Mrs. Gross.

Voice, "Where on the Police Department -- someone in your squad -- do you know who it is, not Kelly, I knew somebody was -- they all think I got it -- this is before the Hill" -- Mrs. Gross.

Voice, "What, a white fellow -- does Sullivan know about -- well, I know when Forte called me he didn't mention any other name but yours -- why" -- Mrs. Gross.

Page 377. Voice, "Well, no, no, I don't -- the Hill case I didn't even know anything -- Mrs. Gross.

839 MR. LOWTHER (continuing). Voice, "I am talking about the other case, about he recalled me and told me about -- that you were doing this, you were doing that, you weren't doing nothing -- why in the hell would he tell me that?" -- Mrs. Gross.

Voice, "You called me. You called me the first time. Sure you did, he told me -- because I wouldn't do anything without your O.K., and he called me and he says 'You will get a call from him,' and I did, one morning. You called me" -- Mrs. Gross.

Voice, "Are you calling him back?" -- Mrs. Gross.

Voice, "Sullivan" -- Sergeant Wallace.

Voice, "Yes -- well, do me a favor, will you. I have played straight with you and do the same thing, have a little respect for my father and do not come to the house" -- Mrs. Gross.

Voice, "Taken me in -- to protective custody -- where they going to put me? -- oh, that's all I need -- well, I'm getting a little

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mad, too, so don't worry -- don't -- don't worry me about he's getting mad. What the hell does he think I am? I am sitting here on a keg of dynamite -- oh, I'm safe here -- what, you kidding? I wouldn't" -- Mrs. Gross.

Up at the top of page 378: "Oh, I don't know, two o'clock in the morning" -- Mrs. Gross.

840 MR. LOWTHER (continuing). Voice, "Are you nuts?" -- Mrs. Gross.

Voice, "Are you calling Sullivan" -- and not "that" -- it's the word "back" -- "Are you calling Sullivan back?"

THE COURT. I will insert that in pencil over the word "that."

MR. LOWTHER (continuing). "Are you supposed to have called me" -- Mrs. Gross.

Voice, "He's going to call you. You supposed to call me. All right, you tell him you spoke to me and just say the girl said that she was leveled with you straight along. Do her this little favor, wait until my father goes back. I mean, hell, it's not that long, and it's nothing that's burning" -- Mrs. Gross.

Voice, "Well, then, you don't want to work when you're off, anyway" -- Mrs. Gross.

Voice, "Oh, my -- that is not right" -- Mrs. Gross.

Voice, "No, I know it's not right, so that's why I said we'll" -- Sergeant Wallace.

Voice, "Yes, well" -- Mrs. Gross.

Voice, "Will you ask him to do me a favor -- then I have a

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clear mind and I don't have to worry, you know, my father worries when I go in" -- Mrs. Gross.

THE COURT. And that ends the taped recordings of the two  
841 telephone conversations of --

MR. LOWTHER. July 24, Your Honor.

THE COURT. -- of Gross and Wallace; and they are the only tape recordings there are of Gross and Wallace?

MR. LOWTHER. That is correct.

THE COURT. All right. Now, gentlemen, let's go to that point where we have some differences. I want to say, gentlemen, I appreciate very much your working together on this thing. It has saved us all a lot of time.

Let's see, we are going to start at -- the first place I have, Mr. Sullivan, for you to conduct your record player, is on 372 where, after Mr. Wallace says, "Well, he's like Sullivan," then there is a voice, "Oh, he's a bum," and a voice, "And he's a friend of Forte," and a voice, "A friend of Forte" -- and those are the controversial questions. All right.

MR. SULLIVAN. Your Honor, I believe we are at that point on the tape.

THE COURT. Thank you.

(The recording was played as appears at lines 18 to 20  
on page 372.)

THE COURT. Well, gentlemen, it seems to me "and he's a friend of Forte's" is Mrs. Gross' voice.

MR. GARBER. That's what I got.

Proceedings

842 MR. LAUGHLIN. Yes.

THE COURT. Mr. Lowther, what did you get it to be, sir?

MR. LOWTHER. Can I hear it just once more, please, Your Honor?

THE COURT. Yes. I didn't get "Oh, he's a bum" in there; I can't hear that.

, (The recording was replayed, through line 20.)

THE COURT. I have it this way, gentlemen, as I read it:

"Oh, he's a bum" -- Mrs. Gross.

"And he's a friend of Forte's" -- Mrs. Gross.

And the next voice, "A friend of Forte," sounds to me like Wallace.

Mr. Lowther, did you get it this time?

MR. LOWTHER. Yes, I did; I have it that way. And instead of "he's a bum," I got "he's a bug."

THE COURT. Well, let's try it again.

(The recording was replayed, lines 15 through 17.)

THE COURT. It could be either, as far as I am concerned, "he's a bug" or "a bum." Frankly, gentlemen, I can't get it. What do you get?

MR. LOWTHER. I have no argument on it -- nothing, then, Your Honor.

843 MR. LAUGHLIN. Well, I couldn't read "bum," Your Honor. I wonder if we could have it played once more.

THE COURT. Yes.

(The recording was replayed, line 15 through 17.)

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THE COURT. She runs the words right into something. I frankly don't know what it is. Is it very important?

MR. LOWTHER. No, it is not to me, Your Honor.

MR. LAUGHLIN. I don't think it is too important, Your Honor.

THE COURT. Very well. Then let's leave "Oh, he's a bum" nobody's voice. And then the next voice, "and he's a friend of Forte," is Mrs. Gross. And then the next voice, "A friend of Forte," is Mr. Wallace. Is there any objection, gentlemen?

MR. LOWTHER. None, Your Honor.

MR. LAUGHLIN. No, Your Honor.

MR. GARBER. No.

THE COURT. All right. Now we have another one. Mr. Sullivan, if you will go over -- I was going to say to the next page, but it isn't the next page to you -- there is Mrs. Gross saying:

"That's what bothers me, because I know, certainly, that -- unless he was there, and once he was there -- told, but how did they know before."

844 And, Mrs. Gross, "Did you know I was in on it before?"  
And then a voice saying, "No."

(The recording was played, at the top of page 373, to the 6th line.)

THE COURT. That was Wallace.

MR. LOWTHER. I am satisfied it was Sergeant Wallace, Your Honor.

THE COURT. Very well. And I assume that's true as well

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with the defense counsel.

MR. GARBER. Yes, Your Honor.

MR. LAUGHLIN. Yes, Your Honor.

THE COURT. All right. Now do we have some more? I believe we do.

MR. GARBER. Page 374, Your Honor, is the next.

THE COURT. Yes, 374. And, Mr. Sullivan, it follows Mrs. Gross saying a number of things, but more immediately, "Well, I don't think they are going to check any more. They still checking records?" And, "What did I call you for? I can't tell them. I called you for this."

And then we have a voice saying, "I called you to fix a particular" --

(The recording was played through the part indicated on page 374.)

THE COURT. I think that was Wallace.

845 MR. GARBER. On the "particular," Your Honor?

THE COURT. The "I called you fix a particular" sounded like Wallace to me.

MR. GARBER. I got it Gross.

THE COURT. Well, we will play it back again, please.

(The recording was replayed through line 16 on page 374.)

THE COURT. I think it's Wallace, for this reason, it's his laugh comes right in. Try it again.

(The recording was replayed, lines 14 through 16.)

(The recording was replayed, through line 17 on page 374.)

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THE COURT. It seems to me it's Wallace. I don't know what it means, in any event.

MR. GARBER. It just seems that she dropped her voice so low.

MR. LAUGHLIN. You got the impression, Your Honor, that she was talking and Wallace interrupted her and made that statement? Was that the impression you got?

THE COURT. Yes; he came in there, whether he interrupted or whether he was coming in and she faded out.

MR. LAUGHLIN. Suppose we try it just once more, Your Honor, --

846 THE COURT. We'll try it once more.

MR. LAUGHLIN. -- and it's probably not too --

(The recording was replayed, lines 14 to 17.)

THE COURT. If you will notice, gentlemen, --

MR. LOWTHER. I know what that is -- "I called you to fix a ticket." That's what that is, not "particular" at all. If you'd play it once again and see if I am not accurate in that.

THE COURT. All right.

(The recording was replayed, lines 14 to 17.)

MR. LAUGHLIN. It does sound like it was a ticket.

MR. GARBER. I think that she did say "I called you to fix a ticket.

MR. LAUGHLIN. A ticket; it does appear to be a ticket.

THE COURT. I think it's a ticket.

MR. GARBER. And I think it was Gross that said it.

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THE COURT. I want you to listen once more, sir, Mr. Garber, because I think if you will observe, when she is laughing, there is a voice in the background going right along, at least as I seem to be getting it that way.

Try it again, Mr. Sullivan.

And notice carefully on this.

(The recording was replayed, lines 10 to 17.)

847 THE COURT. The voice in the background -- did you get it, Mr. Laughlin?

MR. LAUGHLIN. Yes, sir.

THE COURT. It's Wallace's voice, I am quite satisfied, and he's talking about fixing -- "You can say, well you called me to fix a ticket," or something like that; and she laughed. But he is carrying on saying something. At least that's the way I get it.

MR. LAUGHLIN. Yes, that's correct, Your Honor.

THE COURT. You agree with that, do you, Mr. Laughlin?

MR. LAUGHLIN. Yes, I agree, Your Honor.

THE COURT. Mr. Garber, how are you feeling now about it?

MR. GARBER. Your Honor, I agree it's "I called you to fix a ticket. But it still sounds like Gross. I don't think it's important. I think the import of it was that they figured that if they were checking the telephone records, that this particular long distance call would show up; and she is telling him what explanation she is going to give for calling Wallace, if she is asked.

THE COURT. But, you see, she is asking a question, first, "What did I call you for? I can't tell them I called you for this."

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848           Then he comes in and is apparently saying, "Well, you called me to fix a ticket." And he's saying something more, and she laughs, at that particular reason for calling, I gather. I would certainly have to surmise that.

MR. GARBER. I don't think it makes any difference, one way or the other.

THE COURT. Well, if there's no objection, it will be Wallace; and I will write, above "particular," a "ticket."

MR. LAUGHLIN. I will agree to that, Your Honor.

THE COURT. All right. And you'll agree to that too, Mr. Garber?

MR. GARBER. Yes; I think it's a ticket.

THE COURT. And you, Mr. Lowther?

MR. LOWTHER. Yes, Your Honor.

THE COURT. Now do we have some other check marks?

MR. LOWTHER. That's all, I think, Your Honor.

THE COURT. Well, gentlemen, I think you did an excellent job by staying down here and working this out.

Now is there anything further we can do today on this case?

MR. LAUGHLIN. No, I know of nothing further, Your Honor.

THE COURT. Is there anything further we can do as far as you are concerned in this case today, Mr. Garber?

849           MR. GARBER. No; I can think of nothing.

MR. LOWTHER. I have some suggestions, if Your Honor pleases. If the defendant Laughlin or the defendant Forte is going to make anything at all of why hear anything more about these phone calls

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between Mrs. Gross and Mr. Sullivan, I think this afternoon would be an ideal time to do it; or, if they don't want to hear them, fine.

THE COURT. Can you gentlemen sit down and work out that same thing with the Sullivan and Gross conversations, and hope to put in whose voice is what? It's the same problem we have had with this one, is it not?

MR. LOWTHER. I think it may not be. I think they are designated by name.

THE COURT. Oh, they are? Oh, I missed that.

MR. LOWTHER. No, I'm wrong.

THE COURT. I'm afraid they're not. I think it's still "voices."

MR. LOWTHER. You are quite right, Your Honor.

THE COURT. It's the same job, and if we get the same cooperation of counsel; if you will sit down, and if any problem arises, the Court will come in and work with you as I have done on this one.

MR. GARBER. I think that would facilitate it, Your Honor, to hear the tapes uninterrupted.

850 THE COURT. All right. Well why don't you come back here -- it's five minutes of one now, and Mr. Laughlin has to be over at D.C. General Sessions; he has to leave here at ten minutes of three -- couldn't you come back here -- I don't like to rush you with your lunch hour -- couldn't you come back at 1:45 giving you 45 minutes to eat, and come back and start working at it? That will only give you an hour. I don't know whether you would be able to do it in an hour's time.

MR. LAUGHLIN. I would doubt, Your Honor, that we could

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do it in that length of time, having in mind the problems we had this morning. And there are quite a number of conversations, Your Honor. I am quite sure it couldn't be done within an hour.

MR. GARBER. I do see, Your Honor, approximately a hundred pages of transcript.

THE COURT. I was just thinking, too, as I recall from the transcript of the first trial, you gentlemen spent with the tapes and the court reporter practically one whole afternoon, did you not?

MR. LOWTHER. Yes.

MR. LAUGHLIN. I think we didn't get out until about six-thirty or close to seven, Your Honor.

THE COURT. All right. Come in at nine-thirty Monday  
851 morning and start on it, and I won't bother coming out on the bench until again I'm called. You will not have a reporter; but you will sit down and, as you did with the Gross-Wallace conversations, that is, the problems about identifying the voices, and you will try to work it out by agreement as to who said what. When you cannot agree, call it to my attention and we will then listen to that tape, and we will determine it that way.

Mr. Sullivan, you will be here at nine-thirty for the playing of the Gross-Sullivan tapes.

MR. SULLIVAN. Surely, Your Honor.

THE COURT. All right. Thank you, gentlemen. I will see you when you call me on Monday; and we will just leave the jury out there in the jury room without any explanation.

THE DEPUTY MARSHAL. I can carry them to the seventh

Proceeding

floor.

THE COURT. All right; you have a sun parlor up there for them. Take them up there. That will be fine.

(Accordingly at 1:00 p.m. the trial was adjourned until Monday, June 14, 1965, the jury having previously been excused to return Monday morning.)

Bernice Gross - Cross Examination

869 MR. LOWTHER. Your Honor, I have handed the defendant Laughlin and the defendant Forte, through his counsel, copies of the Government's requested instructions.

870 THE COURT. By the way, where are yours, gentlemen?

MR. LAUGHLIN. Your Honor, I have these right now. I'm having some more. What I'll do, I haven't separated them. I wonder if the Clerk would mind separating these, Your Honor.

THE COURT. All right.

MR. LAUGHLIN. At this stage they can be considered joint. There will be some more, Your Honor. And there will be a copy, one for Counsel Lowther and one for the reporter; and I have one for Mr. Garber.

THE COURT. All right.

\* \* \*

874 BY MR. LAUGHLIN:

\* \* \*

875 Q And sometimes, as a policewoman, you would make calls and you would give certain instructions to the operator, wouldn't you?

A Yes, sir.

Q In other words, you would give certain instructions to the operator as to the identity of the person calling? Isn't that right?

A Yes, sir.

Bernice Gross - Cross Examination

Q In other words, you would tell the operator not to mention that you were calling; is that right?

A No, sir.

Q You never did that?

A I don't believe so, no, sir.

Q Would you deny that you ever did?

A I don't believe so.

Q Well now, did you ever, in any call you ever made while you were in the police department, did you ever use any name other than the name of Gross?

A Yes, sir.

Q What names did you use?

876 A Bernice Grosshandler.

Q And what other names?

A That's all.

Q Did you ever use the name "Bernice Handler"?

A No, sir.

Q Did you ever use the name, "Bernice Gorman"?

A That's my maiden name; but I never used it.

Q But at no time did you ever use that?

A In the police department?

Q Yes.

A No.

Bernice Gross - Cross Examination

Q Did you ever use it at any time when you were out--  
THE COURT. Did you answer that last question, did you--  
THE WITNESS. No, sir.

BY MR. LAUGHLIN:

Q Did you ever use it when you left the department?

A No, sir.

Q Now, sometimes you used the name "Bee," didn't you?

A I have used that, "Miss Bee," yes, sir.

Q Would it be "Miss Bee," or would it be "Miss Bernice"?

A No--"Miss Bee."

Q And the operator asked you to spell that?

A I don't remember.

\* \* \*

881 Q And, now, how many times did you call or did Sullivan call you on the telephone and the calls were recorded, if you recall, if you know?

A I don't know.

882 Q You knew that some were recorded?

A I knew some were recorded. One I know was recorded, because I had asked him if the call was being recorded, and he told me it was.

Q In other words, is it your testimony that you only have knowledge of one call being recorded; is that right?

Bernice Gross - Cross Examination

A That is all I know of.

Q What was the date of that?

A Oh, I don't know. I couldn't tell you.

Q Now, in any of the calls you made to Sullivan, are you able to tell us whether any of those calls were recorded?

A I really couldn't tell you.

Q You don't know whether they were or not?

A No, I don't.

Q Now, how many times did Wallace call you on the telephone?

A One time.

Q And the date of that?

A Oh, I couldn't tell you that.

Q Are you sure it's only one time?

A One time.

Q Now, how many times did you call Wallace?

A One time.

Q He called you once and you called him once?

A The same day.

883 Q Do you know whether they were recorded?

A Yes.

Q Which was? Both?

A I think both were recorded, yes, sir.

Bernice Gross - Cross Examination

Q You what?

A I believe that both were recorded.

Q Now there was a day, was there not, that recording equipment was set up in your home?

A Yes, sir.

Q And was that in the morning or afternoon?

A I would say it was approximately five p.m.

Q And did you know before five p.m. that recording equipment was going to be set up in your home?

A Yes, sir.

Q When did you know it?

A I don't know whether it was that day or the day before. I couldn't tell you. It has been so long ago.

Q And who arranged for that?

A Mr. Sullivan.

Q Did he tell you why?

A No.

Q You have told us you knew Wallace, didn't you?

A I knew him, yes, sir.

Q You had known him for some time?

884 A I had only met him one time.

Q And when that call was made from your home to Wallace, did Wallace know it was being recorded?

Bernice Gross - Cross Examination

A No, I don't believe he did, no, sir.

Q And was any reason given to you by Sullivan, why the call to Wallace was to be recorded?

A No, sir.

Q You have no idea?

A No, sir.

Q Now, Mrs. Gross, the other day you were asked and you answered that when you were asked to come over here, you understood it was to be in connection with Sergeant Wallace, --

A Yes, sir.

Q --the allegation being made that he tried to shake down Dr. Forte.

MR. LOWTHER. Wait just a minute, if Your Honor pleases. I am going to object to this. It is not material.

THE COURT. Yes.

MR. LAUGHLIN. Your Honor, can I refer to the transcript?

THE COURT. Of when? You mean the other day?

MR. LAUGHLIN. Where she made that statement.

THE COURT. Just a minute, sir.

Come to the bench.

(At the bench:)

\* \* \*

Bernice Gross - Cross Examination

888 BY MR. LAUGHLIN:

Q Now, was there a time, Mrs. Gross, that Sullivan and Wallace both came to your home?

A Yes, sir.

Q And when was that?

A I can't remember when it was.

Q Was it after the recording between you and Wallace, or was it before?

A It was before.

Q Now tell me, how many times has Sullivan been to your home?

A I couldn't tell you an approximate figure; but I would say about, I would say about eight to ten times.

\* \* \*

891 Q Now, Mrs. Gross, have you been promised anything in this case?

A No, sir.

\* \* \*

906 MR. LAUGHLIN. Your Honor, did Your Honor get the copy of the--Your Honor, I will pass to our opponent a copy of the prayers.

THE COURT. Yes; please do that, yes, sir.

MR. LAUGHLIN. And, Your Honor, it will be helpful, I think, if the reporter has a copy.

THE COURT. Very well.

Bernice Gross - Cross Examination (Resumed)

971 BY MR. LAUGHLIN:

Q Mrs. Gross, when you testified a few days ago, one day last week--I'm not sure of the day--you were asked some questions about a letter, or the composition of a letter, that was to be sent to the United States Attorney's Office by Mrs. Smith. And I believe you mentioned the word "enkindle." Do you recall that?

A No, I don't.

Q You didn't mention that word?

A "Enkindle"?

Q "Enkindle".

A No, I didn't say that.

Q Did you mention the word "humiliation"?

A "Humiliation," yes.

Q And of course you know the meaning of that word, don't you?

A Yes, I do.

Q What do you understand it to mean?

A Well, to be humiliated is to be embarrassed, hurt.

Q Yes. Now the word "embarrassment," you know what that means?

\* \* \*

Bernice Gross - Redirect Examination

\* \* \*

1108

## REDIRECT EXAMINATION

BY MR. LOWTHER:

Q Now, Mrs. Gross, during the course of cross examination by Defendant Laughlin do you recall being asked a question on cross examination as to whether or not he, and this is Defendant Laughlin, asking the question, and you answered the question this way: At no time did you, meaning the Defendant Laughlin, discuss money with you, Mrs. Gross, regarding Jean Smith?

Do you recall giving that answer?

A Yes, sir.

Q Now, I want to direct your attention, if I may, to the letter of January 20, 1963.

You have seen it before and during this case, and I ask you in particular reference to the use of the word discuss, the question was  
1109 asked you by the Defendant Laughlin, Did you after the letter of January 20th, 1963, of Jean Smith and Daniel Smith, ever discuss money for Jean Smith with the Defendant Laughlin?

A Yes, sir, I did.

Q And would you tell the Court and jury what you said in that regard and what he said?

Was it in person or by phone?

Bernice Gross - Redirect Examination

A By phone.

Q Who called who?

A I called Mr. Laughlin.

Q Go ahead and tell the Court and jury what was said, then, please?

A Well, I had told Mr. Laughlin that Jean Smith hadn't gotten any money from that letter from Dr. Forte and he said he would contact the doctor and tell him.

Q All right.

During the course of cross examination of yourself by Defendant Laughlin you were asked a question in regard to your personal appearance before the grand jury, and reference was made to page 10.

MR. LAUGHLIN. May we get the page number, Your Honor?

THE COURT. You may.

MR. LAUGHLIN. Page 10, what proceeding?

MR. LOWTHER. The first appearance, March 1st, 1963.

MR. LAUGHLIN. May we come to the bench, Your Honor,  
1110 so we will know what counsel is going to ask?

THE COURT. You may come to the bench.

(At the bench in a low monotone:)

MR. LOWTHER: Excuse me, Your Honor. I did not mean to come up here without them.

Bernice Gross - Redirect Examination

THE COURT. That is all right.

MR. LAUGHLIN. What page?

MR. LOWTHER. Page 10. The question beginning, Other than the pay checks.

MR. LAUGHLIN. Is it a matter--is this the first appearance?

THE COURT. First appearance, yes, sir.

MR. LAUGHLIN. How long since you have received--is that what counsel's question is?

MR. LOWTHER. It is.

THE COURT. What was it you wanted? I thought you wanted to find out what?

MR. LAUGHLIN. What is counsel going to ask?

THE COURT. Well, I do not know.

MR. LAUGHLIN. I think when he objected--

MR. LOWTHER. I'm not going to--I'm going to ask this witness if before she came over to the grand jury the first time, was she in contact with the Defendant Laughlin by phone, and did she receive any instructions from Defendant Laughlin as to what she should do before the grand jury?

1111 MR. LAUGHLIN. That has all been gone into before. That is repetitious. It opens up--of course, if he wants to ask it, it will open up a whole series of questions.

Bernice Gross - Redirect Examination

THE COURT. What do you base this on, cross examination?  
You started to say something about the grand jury?

MR. LOWTHER. Your Honor, please, on my direct examination I tried to go into two telephone calls, February 27th and 28th, between Mrs. Gross and the Defendant Laughlin. There was an objection to them and then Your Honor sustained the objection.

THE COURT. That is right.

MR. LOWTHER. Now, she has been cross examined as to whether or not testimony given before the grand jury was false and she said, Yes, and I propose to ask her whether or not before she came to the grand jury, did she receive any instructions from the Defendant Laughlin before she came to the grand jury?

THE COURT. You may ask the question.

MR. LAUGHLIN. I think you should keep this in mind, that he is opening up the matter.

THE COURT. You opened it up when you questioned her about the perjury.

MR. LAUGHLIN. Of course, then, I can take her up on recross.

THE COURT. You can take her up on recross examination.

1112

(End of bench. Open Court:)

Bernice Gross - Redirect Examination

BY MR. LOWTHER:

Q Mrs. Gross, my question to you, madam, is this:

Do you recall on cross examination of yourself by Defendant Laughlin that you were asked, referring to page 10 of your first appearance before the grand jury on March 1st, 1963, whether or not you were asked this question and gave this answer:

"Other than the pay checks received from the Police Department"--

MR. LAUGHLIN. Your Honor, I object. The objection I make I believe he should be required to follow the same procedure that we were required to follow this morning. It should be exhibited to her and ask whether that refreshes her recollection. We were required to do that this morning.

THE COURT. He is not refreshing her recollection now, sir. It is something you referred to yourself in your cross examination and read to her, if my recollection serves me correctly.

Go ahead.

BY MR. LOWTHER:

Q Do you recall, Mrs. Gross, at the time Defendant Laughlin asked you this question, I ask you whether you were asked this question and did you give this answer before the grand jury on March 1st, 1963,  
1113 when you first wen before that body:

Bernice Gross - Redirect Examination

Question: "Other than the pay checks which you received from the Police Department for your official duties, did you receive any money or anything of value for anything you did do in connection with the alleged abortion committed by Forte in July of 1961, on Jean Smith?"

Answer: "No, sir."

And do you recall you were then asked by the Defendant Laughline on cross examination whether or not your answer to the grand jury was true or false? Do you remember that series there?

A Yes, sir.

Q My question to you, keeping this date in mind--

MR. LOWTHER. Will you indulge me a moment, please, Your Honor?

THE COURT. Very well.

BY MR. LOWTHER:

Q Keeping the date of March 1, the date of your first appearance in mind, I want to ask you this--

MR. LOWTHER. May this, Your Honor, be marked for identification purposes as Government's Exhibit No. --it is already marked 35, Your Honor please.

THE COURT. Very well.

1114 MR. LOWTHER. May I show it to counsel again, please, Your Honor?

Bernice Gross - Redirect Examination

THE COURT. If you will, please.

MR. LOWTHER. And, Your Honor please also, I want to show what has been marked for identification heretofore, Your Honor, please, as Government's Exhibit No. 34.

BY MR. LOWTHER:

Q Now, I want to show you these two phone tickets. This first one, which is a direct dial I am showing you here; and this second one on the side right here is an operator call.

In regard to that direct dial call--

THE COURT. What is the number, please?

MR. LOWTHER. 35, Your Honor. Government's Exhibit No. 35 for identification.

BY MR. LOWTHER:

Q And I want you to assume for the purposes of my question--

MR. LAUGHLIN. I object to any assumption. I think it ought to be of his personal knowledge.

THE COURT. Mr. Lowther has assured the Court before that he would have the telephone people here so his assumption goes out.

MR. LAUGHLIN. We want to make the objection.

THE COURT. All right.

BY MR. LOWTHER

1115 Q In regard to that direct call, Government 35, I want to ask

Bernice Gross - Redirect Examination

you, and assume for the purposes of my question that reflects a direct dial telephone call from the number National 8-1690 in Washington, D. C., to Forest 7-7440.

That was your home number?

A Yes, sir.

Q On February 28th, the day before you came over to the District of Columbia in 1963, I want you to assume that.

In regard to the other card you have before you, Government's Exhibit 35, the operator call, I want you to assume for the purposes of my question that shows a person-to-person call at night from Forest 7-7440 to National 8-2001 in the evening hours of February 27th, two days before you came over here.

Now, my question to you, Mrs. Gross, is this:

In either or both of those telephone calls did you talk with the Defendant Laughlin?

A Yes, sir, I did.

Q In both of them.

A Yes, sir.

Q And during the course of the telephone conversations that you had, one on one day before you came over to the grand jury, and one on two days before you came over to the grand jury, can you tell me, and you can answer this yes or no, can you tell the Court and ladies and

Bernice Gross - Redirect Examination

gentlemen of the jury whether or not you received any instructions from  
1116 Laughlin, the Defendant, as to what you should do or say when you  
came before the grand jury?

Answer it yes or no?

A Yes, sir.

Q And will you tell the Court and jury what the Defendant Laughlin  
said to you in regard to what you should do before the grand jury?

A He told me, Well, you don't know anything. If they call you,  
you don't know anything.

MR. LOWTHER. All right, will Your Honor indulge me a  
minute, please?

MR. LAUGHLIN. Your Honor, may we approach the bench?

THE COURT. Come to the bench, gentlemen.

(At the bench in a low monotone:)

MR. LAUGHLIN. Having this in mind if--

THE COURT. You asked her concerning whether or not she  
committed perjury before the grand jury and she said she did. This is  
certainly redirect to show what she did and why she did it, that being her  
testimony. It does not come into the matter of the conspiratorial act or  
in any way affects the Defendant Forte within the period of conspiracy.  
But it certainly goes with respect to her credibility.

Bernice Gross - Redirect Examination

MR. LAUGHLIN. Your Honor, of course you understand that opens up a line of inquiry. In other words, it opens a line of inquiry as to the browbeating in Hannon's office.

1117 THE COURT. We will take that step by then.

MR. GARBER. If Your Honor please, I would like to make this application, the two telephone cards, Government's 34 and 35, reflect calls of February--

THE COURT. 27th and 28th of 1963.

MR. GARBER. This conspiracy is alleged to have terminated February 20th.

THE COURT. February 20th, 1963, admittedly so. I think the Government admits that.

MR. LOWTHER. Absolutely.

MR. GARBER. How does this evidence affect Mr. Forte?

THE COURT. The Court is simply going to instruct the jury that any action taken in regard to those telephone calls by Mr. Laughlin and this lady in this area cannot affect anything that Mr. Forte did, as far as the charge of conspiracy, or the substantive count.

What the jury may consider is the credibility of this witness.

MR. GARBER. In order to protect the interest of this Defendant Forte and in view of the fact that ostensibly the introduction of this evidence was to more or less show an alleged substantive offense against

Bernice Gross - Redirect Examination

the Defendant Laughlin, which is not covered in the indictment at this time.

THE COURT. Substantive offense not covered in the indictment?

1118 MR. GARBER. What Mr. Lowther is getting at, he is trying to leave the impression that Mr. Laughlin was attempting to influence this witness' testimony before the grand jury.

THE COURT. There is a charge in this indictment, a substantive charge against Mr. Laughlin of obstructing justice as far as Jean Smith is concerned.

MR. GARBER. This has nothing to do with Smith.

THE COURT. It certainly has plenty. You and Mr. Laughlin took up a question of this witness' own ability and you got in here and had perjury and you disposed of that question and after an instruction to the jury that this matter only relates as far as Forte is concerned, as to her credibility.

MR. GARBER. At this point I would like to go on the record for a motion for severance.

THE COURT. I deny it.

MR. GARBER. Or a motion for a mistrial.

THE COURT. And I deny that.

(End of bench. Open Court:)

Bernice Gross - Redirect Examination

THE COURT. Ladies and gentlemen of the jury, with respect  
1119 to the last bit of testimony you heard, the questions asked by Mr.  
Lowther and the answers given by this witness, you are instructed that  
in so far as any charge against Mr. Forte is concerned, any charge in  
the indictment, a conspiracy and the substantive count, obstructing justice,  
they do not go, this testimony does not apply to Mr. Forte.

However, the testimony may be considered with respect to  
both defendants as to the credibility of the witness. In other words, how  
much credence you give to the witness. Very well.

\* \* \*

1126 BY MR. LOWTHER:

Q Now, I want to direct your attention, if I may, to the question  
that was asked you in regard by the Defendant Laughlin on cross examina-  
tion in regard to whether or not you ever discussed money with the De-  
fendant Laughlin regarding Jean Smith?

And I want to direct your attention now back to the date you  
testified to on direct examination that you first saw the Defendant Laughlin  
and the only time at the Hecht Company Store and you went to the TV Room  
upstairs, back in October of 1963, and your direct testimony was it probably  
was on October 11th, 1963?

And the question you can answer yes or no?

THE COURT. What date?

Bernice Gross - Redirect Examination

MR. LOWTHER. The 11th of October, 1962. I said '63.

I am sorry.

October 11th, 1962.

BY MR. LOWTHER:

1127 A During the course of the conversation between you and the Defendant Laughlin--and answer this yes or no--whether or not the word blackmail was used?

A Yes, it was.

Q And I want you to tell the Court who used it first of all?

A Mr. Laughlin.

Q Now, I want you to tell the Court and jury what Mr. Laughlin, the Defendant Laughlin had to say in that conversation, using the word blackmail, whom did he refer to and what did he say?

A He referred to Jean Smith and he wanted to know whether she was the type of girl that would blackmail the doctor, would she keep bothering him for money? Is she that type girl?

And I told him, No, I didn't think she was.

\* \* \*

Bernice Gross - Recross Examination

1130 BY MR. LAUGHLIN:

\* \* \*

Q Now, Mrs. Gross, you stated, I think it was a week ago yesterday, on June 8th, that you were still in fear of being indicted.

1131 Do you recall that testimony?

A Yes, sir.

Q Are you today, on June 16th, are you still in fear of being indicted?

A Yes, sir.

Q Has anything been said to you by Counsel Lowther or Mr. Sullivan to ease you in that regard in the last week?

A I haven't ask them about it.

\* \* \*

Jean Smith - Direct Examination (Resumed)

1752 BY MR. LAUGHLIN:

Q Now, as to Sergeant Wallace, will you tell us what she said?

A She implied that everyone associated with the case was being paid off.

Q Did she particularize as to Sergeant Wallace?

A Yes, because I would always bring his name up.

THE COURT. I am sorry but there is something wrong.

THE WITNESS. I am awfully nervous.

THE COURT. Yes, I know.

(At this time the reporter read the answer to the Court.)

BY MR. LAUGHLIN:

Q Did she say that he was paid off more than on one occasion?

MR. LOWTHER. Again, Your Honor, I object to this leading question.

THE COURT. I sustain it. This is your witness.

BY MR. LAUGHLIN:

Q What did she say as to Sergeant Wallace being paid off, Mrs. Smith?

A She just implied that he was.

1753 Q Did she say where?

A Oh, no, no.

Jean Smith - Direct Examination

MR. LAUGHLIN. Your Honor, I would like to refresh the witness' recollection. Page 76--

THE COURT. Just a minute.

MR. LAUGHLIN. Page 76 and then 1, 2, 4, and 5th lines.

THE COURT. Put the question to her before once again and let's see if it will refresh her recollection.

BY MR. LAUGHLIN:

A You have testified that Mrs. Gross said Wallace had been paid off. Did she say on more than one occasion?

A No.

MR. LAUGHLIN. Your Honor, I would like--

THE COURT. You may refresh her recollection.

THE WITNESS. Did she make that statement to me on more than one occasion? Is that what you mean?

BY MR. LAUGHLIN:

Q No, did she say that Wallace had been paid off on more than one occasion?

THE COURT. She asked you, sir, whether or not she made that statement to Mrs. Smith on more than one occasion.

Is that your question?

THE WITNESS. That is what I mean.

THE COURT. And that is what you mean to ask her?

Jean Smith - Direct Examination

MR. LAUGHLIN. Yes, Your Honor.

1754 THE COURT. Did Mrs. Gross on more than one occasion make that statement to you?

THE WITNESS. Yes.

MR. LAUGHLIN. Your Honor, could we come to the bench?

THE COURT. Come to the bench, gentlemen.

(At the bench in a low monotone:)

MR. LAUGHLIN. Your Honor, I would like to ask the witness the way it reads, Did she ever tell you Wallace was paid off?

Question: All right, on how many occasions?

Quite a few.

Now, I would like to, what I would like to ask the witness is whether Gross had told her on several occasions or whether Gross had said Wallace had been paid off on several occasions?

THE COURT. This is impeachment of Mrs. Gross and you can question her, was she ever told?

MR. LAUGHLIN. Yes, I guess that is right.

THE COURT. Your work is finished there.

MR. LAUGHLIN. Your Honor, could I inquire a minute whether the District Attorney has records subpoenaed in Mrs. --that was argued before you yesterday morning, whether the records are now ready.

\* \* \*

Discussion (at bench)

1759 MR. LOWTHER. Your Honor I have here the long distance  
copies of long distance call tickets to or from Bernice Gross to this office,  
and I proffer them to the Court at this time because I am objecting to them  
at this time as they are not material.

THE COURT. Just like the first 2 or 3 of them there appears  
to be material there that would be no harm done, they would not be privi-  
leged or anything like that. Let them be marked and if the defendant offers  
1760 them then an objection could be made.

I thought at first there might be something there of a privi-  
leged nature.

MR. LOWTHER. No, sir.

THE COURT. Very well.

(End of bench. Open Court:)

MR. LAUGHLIN. Your Honor, May I have an identification  
mark placed on these.

THE COURT. Have them marked, yes.

You better come to the bench.

(At the bench in a low monotone:)

MR. LAUGHLIN. Your Honor, I am handing you 9.

THE COURT. What you first do is offer them into evidence.

MR. LAUGHLIN. Yes.

THE COURT. You are objecting?

Discussion

MR. LOWTHER. I am, indeed, sir.

THE COURT. Your basis?

MR. LOWTHER. They are not material to the issue in this case.

MR. LAUGHLIN. Your Honor, I think it goes to the cooperation of the Witness Gross.

THE COURT. She testified in answer to your question on cross examination that from March 1st, 1963, to the present Sullivan 1761 called her approximately 20 times, and it could have been more and maybe as many as 50, maybe as many as 30, and she called Sullivan 15 times. So you have it there that she called him more than once and that he called her more than once.

MR. LAUGHLIN. Let me see the period of time these are in, Your Honor.

Your Honor, I think there is an aspect of these here in 9-S, S, for instance this is a call from the District Attorney's Office and it doesn't say who and the charge is 55 cents but that is not too important and the call is on the 30th--

THE COURT. The 30th of what, sir?

MR. LAUGHLIN. September of '63, a call to Baltimore, Bernice Gross and a charge of \$3.45. Therefore, Your Honor, that would reflect a call to Baltimore and that would have to be covering almost an hour.

Discussion

THE COURT. I do not think so. You have some day calls there, 5 or 6 minute calls. So it wouldn't be an hour. I do not know. But in any event, Mr. Laughlin, it seems to me it is not material how long they talked.

You are trying to show cooperation. You show her in Hannon's office and Sullivan and you have got her to admit she was frightened about her predicament, she continues to be; she has cooperated with the United States Attorney's office, she doesn't know whether, even to this day, she might be indicted.

1762 She telephoned some 12 or 13 times and talked to Sullivan. It could have been as many as 30 times, she said.

MR. LAUGHLIN. In any event, Your Honor, I do make an offer.

THE COURT. I know you do, sir.

Mr. Lowther has objected to it and I am going to sustain the objection. And I assume, Mr. Garber, you join in the motion?

MR. GARBER. Yes, sir, Your Honor.

\* \* \*

THE COURT. Call your next witness, Mr. Laughlin.

MR. LAUGHLIN. Your Honor, at this point I rest.

THE COURT. Mr. Garber, I will hear your case.

MR. GARBER. Your Honor, may we approach the bench for a minute?

Discussion

THE COURT. Come to the bench, gentlemen.

1763 (At the bench in a low monotone:)

MR. GARBER. Your Honor, we have reached the posture of the case where the Defendant Forte will go forward and it is anticipated Defendant Forte will take the witness stand and will testify.

Now, prior to his taking the stand I wish to bring to the Court's attention a matter which arose in the courtroom of Judge Tamm during the trial of C. R. 741-61 in which Forte was a witness.

The question arose as to the effort on the part of the Government to introduce or to inquire of Dr. Forte--

\* \* \*

OUT OF THE PRESENCE OF THE JURY

THE COURT. Mr. Garber, you were saying something about, as I understand it, Dr. Forte will take the stand and you had something about something that arose in Judge Tamm's Court in another case?

MR. GARBER. Yes, Your Honor.

Of course, I was not counsel at that time. I have tried to review the record in that case as best I can. But apparently there was an effort in that case to ask Dr. Forte on cross examination certain questions involving a criminal proceeding in Baltimore.

THE COURT. A proceeding or conviction?

Discussion

MR. GARBER. Well, that was the issue, whether or not it was a conviction. And actually it becomes vital at this point because if Dr. Forte takes the stand, then, of course, as I understand the law, the prosecutor may attempt to ask the defendant about prior convictions.

And of course, it is ultimately up to the Court, as I review the Luck case as to whether or not the Court will allow such question to be asked.

Now, I do not know and of course maybe Mr. Lowther may  
1765 not be in the position to say whether or not he is going to ask Dr. Forte whether or not he did in fact have a conviction in Baltimore, Maryland.

Our position is that--

THE COURT. Is that the only conviction of Dr. Forte?

MR. GARBER. Yes, Your Honor.

THE COURT. Is that the only record he has?

MR. LOWTHER. Your Honor, he is under a misapprehension. There is another conviction. And so counsel will not be taken by surprise, in the State of North Carolina this defendant was in 1942, March, 1942, convicted of abortion; suspended, not to violate the State laws for 4 years. There was from that conviction a pardon in 1948 by Governor Jerry, Governor of the State, a certified copy of which I have.

And I have some law that I will be happy to announce to the Court right now that pardons do not wipe out--

Discussion

THE COURT. There is something in the back of my mind that a pardon does not wipe out when you put the character on the State.

I think you go--do you have that there? Give it to me. I want to read it.

You are acquainted with it, are you?

MR. GARBER. Yes, Your Honor.

THE COURT. What is the case you have in mind?

MR. LOWTHER. I have these cases, Richards against the United States, 89 Appeals, D. C., 354.

1766 THE COURT. 89--?

MR. LOWTHER. Appeals, D. C., 354 Weihofer. This is not my research but anyhow the effect of a pardon in 88 Pennsylvania University Law Review, page 177, at page 183, the case is collective and the annotation at 30 ALR 2d, 893.

THE COURT. 8--?

MR. LOWTHER. 893 and that is my authority, Your Honor.

THE COURT. What you have then, as I understand, Mr. Lowther, you have a North Carolina conviction of abortion of the Defendant Forte--and when I say you have--I am assuming you have proof of it, a conviction and placed on probation, and subsequently pardoned by the Governor of the State?

Is that right?

Discussion

MR. LOWTHER. I do, sir.

THE COURT. And there is some question here about a Baltimore conviction. I know nothing about this at this stage.

Do you have anything on that?

MR. LOWTHER. My information is that this defendant in Baltimore, and I can't give you the year right now, Your Honor please, but it is mutli, more than one, abortion pleas, I think. And there again he was--it was my information he was put on probation in Baltimore City.

THE COURT. A judgment entered against him finding him guilty, whether it be on a plea of guilty or conviction?

1767 MR. LOWTHER. I assume so, sir.

I am not thoroughly familiar with that aspect but I will make myself familiar over the luncheon recess.

THE COURT. Are you going to use it for cross examination?

Do you have something to back it up?

MR. LOWTHER. I think we have.

MR. LAUGHLIN. Your Honor, I think I can help you there. In Maryland it is a practice that probation before a verdict is not a conviction. And I think we have the supporting data on that. Probation before a verdict.

THE COURT. What page do you have there, Mr. Garber?

Discussion

MR. GARBER. Your Honor, that is the information I have. It is not a case.

THE COURT. Now, wait a minute. I am not interested in information. I gather that--

MR. GARBER. There was no verdict in the case.

THE COURT. There was not any verdict because there were pleas of guilty?

Is that right?

MR. LAUGHLIN. Well, the--

MR. GARBER. The information I have is the verdict and sentence were stricken out by the Court September 27th, 1955.

1768 THE COURT. The verdict. Of course, if there is a plea of guilty you do not have a verdict. You have a judgment entered on a plea of guilty.

MR. LAUGHLIN. I think the effect of that was to withdraw that and under the Maryland practice, Your Honor--

THE COURT. What is the case, Mr. Laughlin?

MR. LAUGHLIN. I do not have it for you now but I will have it at the noon recess.

THE COURT. Well, what you want now is the assurance that this Court will not let your defendant be cross examined on these prior convictions?

Discussion

Is that right, Mr. Garber?

MR. GARBER. Your Honor, I think it is a serious question.

THE COURT. I think it is a serious question whether you want some assurance from this Court, is that it?

MR. GARBER. Yes, Your Honor, that is it.

THE COURT. Well, you will not get it until I get some law on it.

MR. GARBER. Yes, and it is going to involve whether or not this man takes the stand.

THE COURT. I understand that. I am simply not going to tell you something in advance right now, without your coming here without even information and no cases.

What you would like to have me say, Mr. Garber, being com-  
1769 pletely uninformed the Court should hold that the United States Attorney may not cross examine this defendant as to prior convictions.

I am not going to give you that assurance. You come in here with some cases and show that he cannot under th law cross examine concerning some prior conviction and I will give you some sort of a rule, and not until that day comes--I am not going to do it.

And you are going to give me some information this afternoon, are you, Mr. Lowther, on that Baltimore complaint?

MR. LOWTHER. Yes, Your Honor.

Allan Forte - Direct Examination

THE COURT. All right, 1:45, gentlemen.

Come loaded with your cases and I want them at 1:45.

\* \* \*

1803 BY MR. GARBER:

\* \* \*

1804 Q And do you have any profession?

A I am a physical therapist and chiropractor by profession.

Q Now will you tell us what schools you went to and what degrees you attained?

A Well, as far as chiropractics is concerned, I am a graduate of the New York College of Chiropractics, and several other schools in physical therapy.

Q And do you have degrees from any of these schools?

A Doctor of Physical Therapy and Doctor of Chiropractics.

Q And how long have you been engaged as a chiropractor and physical therapist?

A Oh, as far as my memory goes, I was graduated since 1923. I have been in this state 25 years.

\* \* \*

1806 BY MR. GARBER:

Q Now, Dr. Forte, prior to the time of this trial, prior to June 2d, 1965, and specifically during the year 1962, did you ever have an occasion to meet Bernice Gross?

Allan Forte - Direct Examination

A I did.

Q And when was the first time that you and Bernice Gross had any conversation?

A On or about August of '62.

MR. LOWTHER. I didn't get the answer, Your Honor.

THE COURT. August 1962.

BY MR. GARBER:

Q Now where were you when you first talked to Bernice Gross?

A I was at home.

Q And how did Bernice Gross get in touch with you on that occasion?

A I received a call from a woman, who said to me, "I was instructed by a friend of yours to get in touch with you. And I could be a lot of help to you."

I said, "Who is this friend?"

She refused to divulge who was this friend. She said, "I could be a lot of help to you."

And I said, "Why? For what?"

1807 She said, "Isn't there any way out that we could meet and discuss it?"

And I said, "Who are you, and who is this friend you are talking about?"

She refused to divulge that.

Allan Forte - Direct Examination

I said, "Well, you call me back later."

Q All right. Now did there come a time when this person called you again?

A Yes, she called me again.

Q And in relation to the first call, how soon afterwards?

A Oh, a couple of weeks, one or two weeks.

Q And do you recall what the conversation was?

A The conversation was this. She said, "Have you decided to meet me?" She said, "It is for your benefit."

I said, "Meet me in Washington in my office."

And she said, "No, I don't want to come to your office."

I said, "Why?"

She said, "I don't want to be identified."

THE COURT. I didn't hear the last of it. What was the last, sir?

THE WITNESS. I asked her to meet me in my office at Georgia Avenue, 3809 Georgia. She said, "No, I don't want to be identified. Is  
1808 there anywhere else I can meet you without personal identification?"

I said, "Well, I am a member of the Negro Businessmen's Club, the Chesapeake Club." I said, "Do you know where it is?"

She said, "No; but I can find it."

It's in the 2200 block of Eutaw Place.

Allan Forte - Direct Examination

BY MR. GARBER:

Q Now did you arrange to meet this person at the Chesapeake Club?

A I did.

Q And when was this meeting to take place?

A I just can't recall that.

Q How soon after the phone call?

A Oh, the following day.

Q And did there come a time when you went to the Chesapeake Club?

A I did.

Q And what time of day did you arrive there?

A It was on or about a quarter of nine, because she told me, "I have to be at work at nine," or some time there later. And I met her between 8:45, 8:50 or 8:45, a.m.

Q Now was there anyone else at the Chesapeake Club at this time?

A No.

1809 Q And you said you arrived at the Chesapeake Club at about 8:30 or 8:45?

A I did.

Q And was there anyone there when you arrived?

A No.

Allan Forte - Direct Examination

Q Now did there come a time when someone else came to the club?

A Well, during that interim, between the next few minutes, the door bell rang. It's a key club; we let ourselves in. And this woman came.

Q All right. Now what woman came to the door?

A The woman who came asked me if I was Dr. Forte. I said yes. By the previous telephone conversation of her voice, I recognized who she was. It was the woman who had spoken to me twice before.

Q And did she identify herself?

A Yes. She said, "I am Bernice Gross."

Q And is this the same woman who testified during the course of this trial?

A That's right.

Q Now did you have a conversation with Bernice Gross at the Chesapeake Club on this particular occasion?

A I did.

Q And would you tell the Court and jury what that conversation was, sir?

1810 A She told me, she said, "You don't, probably you don't know who I am."

I said, "No, I don't."

Allan Forte - Direct Examination

She said, "I am formerly a member of the Baltimore Police Department." She said, "Have you read of the Block Situation?"

I said, "Yes. But names, I wasn't interested in that to retain the names, as to who they are."

She said, "Well, I have been kicked out of the Baltimore Police Department, and I got it in for them, and I think I can help you."

And I said, "In what capacity can you help me? What is your interest in me?"

She said, "Aren't you involved in the Smith case in Washington?"

I said, "Yes, I am." I said, "What have you got to do with that?"

She said, "I can be a lot of help for you, because I am the woman, I am the police officer, who made an investigation at St. Agnes Hospital. And I am no longer with them."

I said, "Why are you so concerned? Who is this friend who sent you here?"

She refused to tell me, and up to this time she has never told me who is the person that told her to see me.

1811 Q Now, after she told you about the seeing Smith at St. Agnes Hospital, what else did she say?

A Well, I said to her, "I am not concerned about the Smith case. That's the least of my worries." I said, "I'm not involved. I have been

Allan Forte - Direct Examination

criminally accused," I said, "but I am not involved. I am not concerned about that Smith case."

She said, "I can be a lot of help to you." She said, "Don't you know Wallace?"

I said, "Yes."

"Well, hasn't he been getting money from you?"

I said, "Where did you get that information from?"

"Well, he has been shaking down everybody here, including Dr. Ricca, and other persons."

And I said, "I don't know where you get that information from."

THE COURT. I didn't get the last part of it.

THE WITNESS. I told her, "I don't know where you got that information from."

And she said, "If you will give me time, I will convince you."

I said, "My greatest concern is not Mrs. Smith. My greatest concern is to extricate myself from the implications, from Wallace, who has been haranguing me, calling my office, walking in my office, calling  
1812 me night and day, trying to get money out of me."

She said, "Well, I can take care of that, because you are not the only person he has been haranguing."

Allan Forte - Direct Examination

BY MR. GARBER:

Q Now, did you have any further conversation with Gross on this first meeting at the Chesapeake Club?

A No. This was an occasion when I was hesitant, because I didn't know who she was. I didn't know what she wanted. But she said, "I could be of benefit to you. If it all you are worried about is Wallace, I can take care of that."

Q And then what happened after that, sir?

A A subsequent visit to the club, and she told me, "Stop worrying about Wallace. I will take care of him. But," she said, "I need expenses."

Q All right. Now did she go into detail about what she meant about expenses?

A No, she did not. She said, "I get around and get information that I need." She said, "I have contact here." I took it from her that she meant Baltimore. She said, "I have contact here, and I can get information that will help you."

Q All right. Now was any specific figure mentioned?

A No.

1813 Q Did she go into any more detail about how she could help you or what she could do concerning Wallace?

A No, no more than having said that, "If it's Wallace is all you are worrying about, I'll take care of that." And before leaving that morning I gave her \$75.

Allan Forte - Direct Examination

Q For what purpose?

A She said she needed expenses to getting around; that she couldn't get the information to help me unless she paid for it.

Q Now during that conversation was the name Smith mentioned at all?

A I can't recall Mrs. Smith's name being mentioned. We were more concerned about Wallace. I told her I wasn't worried about Mrs. Smith, I wasn't concerned, I wouldn't worry about it.

Q Now how many times did you meet Mrs. Gross at the Chesapeake Club?

A As I recall, I met her twice in the club, and twice outside.

Q Now do you recall over what period of time you met Mrs. Gross at the club, from the first meeting to the last meeting?

A Oh, that I can't recall. It was between '62 and '63.

1814 Q Did you have any conversations with her over the telephone during that period?

A Yes. She called me. As I said, the first time she called me, I never knew who I was talking to. She told me in the future, "I'm trying to get back in the Baltimore Police Department. I need \$500; for \$500 I can get back in the Police Department." She said, "When you call me, or I call you, I am going to identify myself as Mrs. B.

Allan Forte - Direct Examination

Q All right. Now did you ever have any conversations with Gross, over the telephone, from your office in Washington?

A Yes. I cautioned her, I said, "Don't you be calling my home." She could have known the number. I never gave it to her. I said, "Don't you ever call me at my telephone at home." And she called me in Washington several times, to give me progress that she said she was making.

Q Did she ever turn over to you any documents or anything?

A No.

Q Did she ever give you the names of any persons who might now something about this Wallace situation?

A Except that she said to me, "You should know that he has been involved and was shaking down Chris Campbell." She said, "Do you know Chris Campbell."

1815 And I said, "No. I have heard of him. He is one of the outstanding abortionists in Baltimore."

Q Now did you continue to give Gross money?

A Several times.

Q And for what purpose were you giving her money?

A She told me she needed it for expenses, to get the information for me to overcome my difficulties with Wallace.

Q Now did she tell you what she was, other than expenses, what she was going to use the money for?

Allan Forte - Direct Examination

A No.

Q Now when was the last time that you had any conversation with her about money?

A Oh, that would be probably some time in December '63.

Q And do you recall that conversation, Doctor?

A She told me, she said, "I need \$500."

I said, "Up to the present the little money I have given you hasn't produced anything for it," and I refused to give her the money. I said, "I don't have it and I am not going to give it to you."

Q During any of these conversations that you had with Gross, was there ever any conversation about any letters that were to be written by Mrs. Smith to Washington?

A No; that has never been discussed with us.

Q And did you ever give Gross any money to give to Smith?

1816 A No.

\* \* \*

1818 Q And during the month of January 1963 did Gross have any conversations with you concerning money?

A Yes. She came and she said, "This is an emergency, and I've got to have \$500."

1819 I said, "I don't have it so far." I said, "You have taken two hundred from me for expenses, for investigation, to give me

Allan Forte - Direct Examination

information to overcome the Wallace situation, and you haven't produced anything so far." And I refused to give it to her. I said, "I don't have it, and I am not going to give it to you."

\* \* \*

1820 BY MR. GARBER:

Q Now during this period of time, Doctor--that is, the period during the year 1962 and the early part of 1963, up to and including February 20th--did you ever instruct anyone to tell Smith to lie?

A No.

Q Did you ever yourself, or did you ever instruct anyone, to tell Smith to leave the area or take a vacation, or something of that sort?

A No.

Q Did you ever yourself, or give any instructions to have Smith try to take steps to drop the case?

A No.

Q Now, Doctor, during these conversations that you had with Gross during the course of the trial, was there ever any conversation between you and Gross as to anything that happened during the course of the trial?

1821 A She called me during pretty near the finale of the trial, and she said, "I hear Wallace is denying everything. All of your accusations, he has denied them."

\* \* \*

AllanForte - Cross Examination

1821 MR. LOWTHER. I wonder if there are any questions by the co-defendant, if Your Honor please.

THE COURT. Do you have any questions?

CROSS EXAMINATION

BY MR. LAUGHLIN:

Q Doctor, could you tell us when was the first time, sir, if you can recall, that you informed me, if you did inform me, about your conversations with Gross?

THE COURT. Just a minute, Counsel. Come to the bench.

(At the bench:)

THE COURT. The defendant Laughlin having rested his case, what are you going into here? What is this? You have a right to cross-examine this defendant in so far as he is injuring your case. But what has he said here?

MR. LAUGHLIN. Probably not, Your Honor, probably not.

1832 THE COURT. You have rested your case.

MR. LAUGHLIN. That is true. Clearly I would say I would have no right to cross-examine him. He said nothing pertinent to me, no.

THE COURT. No; so I don't see what you have.

MR. LAUGHLIN. Well, the only thing--

THE COURT. If you had called him as your witness. But you closed your case, and he is now testifying in his own case. There

Allan Forte - Cross Examination

is a scope of the direct examination within which he can be cross-examined. But from what I head of your starting to ask him so far, you are going beyond that. You may cross-examine as to anything within the scope of the direct examination; but that is all.

(In open court:)

MR. LAUGHLIN. Your Honor, in view of that, I have no cross-examination

\* \* \*

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\* \* \*

1905           September 22, five days earlier than the September 27, '55, date is this: verdict and sentence imposed on 2 March '55 reconsidered and stricken out, and probation before verdict entered. No supervision. Moser, Judge.

          In Criminal No. 3126-54, State against Forte and Ernestine Thomas, indictment filed July 15, 1954, plea of not guilty. March 2 --

          THE COURT: What was the charge?

          MR. LOWTHER: The charge was abortion, Your Honor.

          March 2, 1955, same date, verdict as to Forte: guilty.

          March 2, 1955, judgment as to Forte: Three years in Maryland Penitentiary, fined a thousand dollars and costs. Suspended, probation five years upon payment.

          March 14, 1955, as to Forte: Sentence imposed on 2 March 1955 reconsidered and stricken out, resentenced to three years, five hundred dollars and costs. Sentence suspended to penitentiary. Probation of five years upon payment of fine and costs. Fine and costs paid on April 22, 1955.

          Again, on September 27, 1955, as to Forte: Verdict and sentence imposed on 2 March '55 reconsidered and stricken out, and probation before verdict entered. Moser, J.

          The next one, 3292-54, charge: abortion, State against Forte, -- I want to be sure I'm not duplicating myself, Your Honor, -- no, I'm not -- indictment filed August 2, 1954, plea of not guilty. March 2, 1955, verdict: guilty. March 2, 1955, Judgment as to Forte: Three years in the Maryland Penitentiary, consecutive with the indictment in 3126, fined

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a thousand dollars and costs, prison term suspended, five years probation upon payment.

March 2 -- this is as to another defendant who is in the case and is not applicable here.

March 14, 1955, as to Forte: Sentence imposed on 2 March 1955 reconsidered and stricken, resentenced to three years Maryland Penitentiary, consecutive with 3136, fined five hundred dollars and costs, sentence suspended, probation of five years upon payment of costs -- fine and costs. Fine and costs paid on April 22, 1955.

September 27, 1955, as to Forte: Verdict and sentence imposed on 2 March '55 reconsidered and stricken out, and probation before 1907 a verdict entered. Moser, Judge.

And that's the last one I call to Your Honor's attention.

Now, sir, the terms of Court in 1955, the Criminal Court of Baltimore, were as follows: The second Monday in January, 1955; the second Monday in May, 1955; and the second Monday in September, 1955. And the second Monday in September of 1955 fell on the date of September 12, 1955.

Therefore, there had been a finding of guilty in each of the cases that I have cited to Your Honor against this defendant in Baltimore City, in Baltimore Criminal Court, in the month of March and two sentences imposed, one on March 2 and the others on March 14 and 15 of 1955. They, therefore, would be within the January 2nd-May 2nd term of Court.

Thereafter, after one full term of court had expired, that is the May 2nd to September 12 term in that year, -- after that, these

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sentences were stricken -- stricken. What actually it was, it wasn't the sentence that was stricken, it was the verdict that was stricken, if Your Honor pleases, and probation before verdict was entered, at a term of court two terms removed from the time that the verdicts were entered.

Now, if the Court pleases, -- will you indulge me a moment, please?

1908 THE COURT: Surely.

MR. LOWTHER: If Your Honor pleases, in brief, it is the government's contention, sir, that it should be allowed on cross-examination to question this defendant as to whether or not he is the same Forte who was convicted in Baltimore City on March 2, 1955, of these several abortions, for this reason:

The government urges upon the Court that the action of the Judge in Baltimore on September the 27th, 1955, was a nullity when he entered probation before verdict; that he had no business, under Maryland law, in striking as he did.

And in that connection I would like to call Your Honor's attention, if I may, sir, to the case of Jones v. State, which appears in Volume 214 of the Maryland State Reports. Unfortunately, I don't have the Atlantic citation. In Jones v. The State, there was a question. Jones was convicted of assault, and on appeal, -- there were two appeals actually -- they were heard together -- the second appeal was from the refusal of the trial judge, some five months later, to strike out the verdict.

The opinion of the Court of Appeals of Maryland is:

We think it clear that the Circuit Court was without

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1909 power to act on the motion to strike. There is no thirty-day provision as to judgments in criminal cases, and as to them the power of the court expires with the end of the term, absent fraud, surprise or mistake.

In Czaplinski v. Warden of Maryland Penitentiary, which is cited at 75 Atlantic 2d, 766 --

THE COURT: Page 766?

MR. LOWTHER: Yes, sir. An opinion by Chief Judge Marbury. Well, I'm going to use the Maryland State Reports because I marked that, if Your Honor please.

It is also in 196 Maryland Reports, page 654.

It is an application for leave to appeal from an order of Judge Sayler in the Baltimore City Court denying applicant the writ of habeas corpus.

Applicant was tried by a jury in the Criminal Court of Baltimore, found guilty of assault to rob with a deadly weapon, and on March 1, 1945, he was sentenced by Judge Dickerson to ten years in the Maryland House of Correction. There were four other cases against him.

Then the Court goes on to say:

"As of March 1, 1945, therefore, applicant faced a total of eleven years in the Maryland House of Correction.

1910 "On August 2, 1945, Judge Clark, in the Circuit Court for Anne Arundel County, sentenced the applicant to seven years in the Maryland House of Correction for riot and assault, this sentence to run consecutively to the other sentences he was serving. At that time, therefore, he

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faced a total of eighteen years to be served in the House of Correction.

"The records of the Criminal Court, which we have had certified to us, show that on August 9, 1947, the ten year sentence imposed March 1, 1945, was reconsidered and stricken out by Judge Dickerson and the applicant was re-sentenced to six years . . . "

Now, he was first sentenced by Judge Dickerson on March 1, 1945. On August 9, 1947, the ten year sentence imposed by Judge Dickerson on March 1, 1945, was reconsidered and stricken.

THE COURT: August 9 -- what was the year?

MR. LOWTHER: 1947, sir.

THE COURT: And it was stricken?

MR. LOWTHER: Stricken, sir.

THE COURT: And resentenced?

MR. LOWTHER: And resentenced on the same date. The applicant was sentenced to six years in the Maryland Penitenriary.

1911 On the same date the one year sentence that was consecutive to the ten year sentence was also stricken out, and the applicant was re-sentenced to one year, to run consecutive to the new six year sentence.

Then the Court of Appeals goes on to say:

"If the reduction of the original sentences by Judge Dickerson was a valid exercise of his jurisdiction, then of course the Baltimore City sentences have been completed, and applicant is now held under the Anne Arundel County sentence. On the other hand, if Judge Dickerson had no

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authority to reduce the original sentences, and his subsequent actions were void, then the applicant is still serving the original sentences."

And then, after a review of Maryland and other cases, the Court of Appeals of Maryland says:

1912 "In criminal cases, where a sentence has been increased, either during or after the term in which the sentence was imposed, it is the general rule that the action of the court is void because the prisoner is placed in double jeopardy. Where the sentence has been decreased after the term, the reported cases we have been able to find which discuss the point hold that this is also beyond the power of the court, generally upon the ground that when a sentence has been passed, and has become enrolled, the jurisdiction of the courts is concluded and the court has no further authority."

At the end of the opinion, which is rather long, the Court of Appeals has this to say:

" . . . but as a court has, in general, no authority to strike out or alter a sentence, once imposed, after the expiration of the term, and a question of jurisdiction arises, we think it incumbent on the relator to show that the action of Judge Dickerson was within his powers. We cannot assume that he had a right to reduce the sentences in the face of the practically universal rule that his jurisdiction ended with the term after the original sentence

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was imposed, when it became enrolled. Since we cannot make that assumption we must conclude that the original sentences are still in force and that we cannot now consider the questions raised as to the subsequent sentence."

THE COURT: Mr. Lowther, if I understood correctly those last few words you read, they were assuming that a sentence could not be changed after the term. Is that what the words said?

MR. LOWTHER: "We cannot assume that he had a right to  
1913 reduce the sentences in the face of the practically universal rule that his jurisdiction ended with the term after the original sentence was imposed, when it became enrolled."

THE COURT: But they don't say, in so many words, that the term had expired.

MR. LOWTHER: I say that this case does state that proposition, sir.

THE COURT: Let me see it.

(The book was handed to the Court.)

MR. LAUGHLIN: Your Honor, which case did counsel read?

THE COURT: Czaplinski v. Warden, 196 Maryland Reports  
654.

MR. LAUGHLIN: Thank you, Your Honor.

THE COURT: I notice, Mr. Lowther, that in the very next to the last paragraph, I suppose you would call it, of that opinion, Judge Marbury stated:

"Whether the reduction of a sentence is an exercise of the pardoning power, as was held in Minnesota, or

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whether it may be a part of the judicial function, as the Supreme Court views it, at least during the term, the judges of the criminal courts of the State should not attempt to reassume a jurisdiction which they have lost, and to take upon themselves duties which the people and the legislature have placed elsewhere."

"At least during the term" -- now get that.

He said: "Whether the reduction of a sentence is an exercise of the pardoning power, as was held in Minnesota, or whether it may be a part of the judicial function, as the Supreme Court views it, at least during the term, . . . ."

I thought it was your point that once the term expired, they lost jurisdiction.

MR. LOWTHER: Indeed it is. I have two points, sir.

The point that Your Honor raises there is this: My first contention is that the Judge's action on September 27, 1955, was a nullity, that he had no power to strike. And on that point, if I may interrupt for a second, if Your Honor pleases, --

THE COURT: Yes.

MR. LOWTHER: -- and I'm reading to you now from the Laws of the State of Maryland, Chapter 529, Senate Bill 135, which was approved April 27, 1951.

Now, I want Your Honor to clearly understand while I am reading this to you that this was not in effect at the time that these

1915

events took place that I have related to Your Honor this

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afternoon. By "these events," I'm talking about the convictions of Forte over in Maryland.

Here's the way it reads, Your Honor, and this goes right to State v. Czaplinski -- right to it -- and it is entitled, "An Act to repeal and re-enact, with amendments, Section 277 of the Baltimore City Charter and public local laws."

It is entitled, "Probations and suspensions of sentence to give authority to Criminal Courts of Baltimore City to suspend sentence and admit offenders to probation at any time before expiration of sentence."

Here are the "whereases":

Whereas, the Court of Appeals of Maryland recently held in the case of State ex rel Czaplinski v. The Warden, 75 At. 2d 766, that the power of a criminal court to modify sentence in criminal cases expired with the end of the term of court in which rendered and the decision has cast doubt upon the authority of the Criminal Court of Baltimore City to suspend sentence and grant probation to offenders after the lapse of the term; and

1916       Whereas, it is desirable, in the opinion of the legislature that the Judges of the Criminal Court of Baltimore shall have the power and authority to suspend sentence and grant probation at any time before expiration of sentence;

Section 1. Be it enacted by the General Assembly of Maryland: -- and here's the section:

The Criminal Court of Baltimore City and the

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several parts thereof as heretofore or may hereafter be instituted before conviction of any person accused of crime, with the written consent of the person so indicted, including persons appealing from convictions of the police, magistrates and justices of the peace assigned to Juvenile Court and to the Traffic Court in Baltimore City, whether infant or adult, and after conviction or after a plea of guilty or of nolo contendere, without such consent, are empowered --

and then in brackets is this phrase which means that it was deleted from the bill as finally passed -- here's the phrase that was deleted:

During the term of court in which such consent, conviction or plea is had.

That's out.

1917 Here's the way it reads them:

-- without such consent are empowered -- italicized -- this is the Act --

at any time before the expiration of any sentence imposed upon such person to:

- (1) Suspend the sentence;
- (2) Place such person on probation before or after commitment and incarceration;
- (3) And in all such cases above-named to make such written condition and suspension of sentence or probation as the court may deem proper.

That was enacted April 27, 1951.

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Now, sir, the Annotated Code of Maryland, 1957 Edition,  
Article 27, Section 641:

Circuit Courts of counties and Criminal Court of Baltimore  
City. It reads as follows:

1918 "The circuit courts of the several counties in this  
State and the Criminal Court of Baltimore City, before  
conviction of any person accused of crime with the written  
consent of the person so accused, including persons ap-  
pealing from convictions before trial magistrates, whether  
a minor or an adult, and after conviction, or after a plea  
of guilty or nolo contendere, without such consent, are  
empowered, during the term of court in which such con-  
sent, conviction or plea is had, to:

- "(1) Suspend the imposition of sentence; and/or
- "(2) Place such person on probation without finding  
a verdict; and
- "(3) Make such conditions of suspension of sentence  
and probation as the court may deem proper."

And the language is, "during the term of court in which such  
consent, conviction or plea is had."

We have here, if Your Honor pleases, --

THE COURT: When did that section go into effect?

MR. LOWTHER: My reading of it, sir, is 1955.

THE COURT: What is the date in 1955?

MR. LOWTHER: Indulge me a moment, please, sir.

THE COURT: Certainly.

MR. LOWTHER: Your Honor, I'm sorry.

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THE COURT: It doesn't make much difference if it was in 1945, does it?

MR. LOWTHER: No, sir. 1955.

THE COURT: I'm sorry. I'm looking at Czapinski.

MR. LOWTHER: Now, the other argument that I have, Your Honor, is this:

Number 1: That Judge Moser had no power, that his final 1919 action was a nullity.

Number 2: That Judge Moser, even if his final action was not a nullity, was, in effect, pardoning this defendant Forte by the entry of probation before verdict.

That is the absolute result of that action, because probation without verdict in Maryland -- it's nothing -- the person comes in before the Court, can enter a plea of not guilty, and the Judge says, "Probation without verdict and no supervision," and out he walks.

THE COURT: Well, that is exactly the problem, because in State v. Jacob, 199 At. 2d 803, which is a Maryland case, coming down in 1964, Chief Judge Brune, writing the opinion, which was dealing with the lack of power actually of a justice of the peace, in talking about Article 52, Section 100, "Trial Magistrates System subtitle of Art. 52 of the 1957 Code," -- oh, yes -- that was dealing with the trial magistrate section -- this says:

"That section does confer power upon trial magistrates to suspend sentence or costs, or both; but that is something quite different from the power to grant probation without verdict."

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Then the Court says:

1920        "The power to suspend sentence can be exercised only when there has been a conviction and sentence thereon; probation without verdict, if granted, avoids any finding of guilt. Indeed, one of its primary purposes, where its use is deemed appropriate, is to avoid placing the stigma of a conviction on the accused."

It further says:

"The difference is further manifested by the fact that these two powers are separately mentioned and dealt with by several statutes."

And then:

"See Code (1963 Cum.Supp.), Art. 26, sec. 114(a)(1) and (2) -- powers of the Municipal Court of Baltimore City; Art. 27, sec. 641 (1) and (2) -- "

MR. LOWTHER: That is the one I just cited to Your Honor.

THE COURT: " -- powers of the Municipal Court of Baltimore City; -- "

It appears that there is no question about it, if Allen Forte had been placed on probation without verdict having been entered, there would have been no finding of guilt.

MR. LOWTHER: Absolutely. If that was all done, Your Honor, I have been advised by a reputable attorney in the State of Maryland that I would have no right -- the government would have no right - to say:

1921        "Are you the same Allen Forte who, on such and

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such a date, was convicted of abortion in the Baltimore City Criminal Court?"

But that is not what was done in this case, Your Honor. There were two verdicts, and I mean a verdict of guilty in each and every one of the cases I cited to you, sir. There were two sentences imposed in March of 1955.

THE COURT: Actually, didn't he pay the fines even?

MR. LOWTHER: He did. He did, sir. On April 22nd.

THE COURT: Of course, our own Code, Section 14-305, 1961 Edition, Supplement 4, says:

"No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers as to such matters. In order to prove such conviction of crime it shall not be necessary to produce the whole record of the proceedings containing such conviction, but the certificate, under seal, of the clerk of the court wherein such proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient."

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MR. LOWTHER: And I have that right here, sir.

THE COURT: I will hear you, Mr. Garber.

MR. GARBER: If Your Honor please, it seems that what

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the government is attempting to do in this case is to present a collateral attack on a foreign judgment.

THE COURT: You had better get down to the collateral attack and answer it, whether or not that is so.

MR. GARBER: The last entry on it is probation without verdict.

THE COURT: At that last -- in North Carolina it is pardon.

MR. GARBER: We have a different situation in Maryland. The Court of Appeals in Maryland says that probation before verdict is not conviction.

THE COURT: This, sir, happened to be a conviction. A fine was imposed, a fine paid. Then, after the term of court had expired, the setting aside of the verdict.

MR. GARBER: Your Honor, I don't think that this Court has the power to go behind the Maryland judgment.

THE COURT: I am talking about the judgment of conviction.

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MR. GARBER: The last entry --

THE COURT: I haven't any right to go behind the pardon in North Carolina.

MR. GARBER: Pardons are an executive matter, given by the Governor of the State. That was part of the pardoning power vested in the Executive Officer of the State who pardoned. That is one thing.

Here we have a judgment of a court which says that these prior judgments are stricken out -- stricken out -- and in their place, probation before verdict.

Now, whether or not the judge over in the Maryland Court

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had the power to do that, I don't think we should be concerned about here, and I don't think that this Court has the power to go behind it.

I don't think that the government can present a collateral attack on a foreign judgment in a criminal case where the parties are not the same, where the merits of the case have nothing to do with the foreign judgment, and the only purpose of questioning a witness or any other individual about a conviction for the crime goes solely to his credibility. It has nothing to do with the merits of this case that is on trial. And as far as that Maryland judgment is concerned, I believe  
1924 that it is entitled to full faith and credit.

THE COURT: I am going to give it full faith and credit. I am going to give full faith and credit to the judgment of conviction.

I will let you then, on redirect examination, point out that something was set aside, just as with respect to the pardon.

If the United States sees fit to introduce evidence concerning the abortion conviction in the City of Baltimore in 1955 -- or 1954, whenever it was, -- they may do so.

MR. GARBER: I make this point --

THE COURT: You have made your record.

MR. GARBER: A man can be confronted with a conviction of crime -- I believe that means final conviction, sir.

THE COURT: You have made your record, sir.

Bring in the jury.

MR. LOWTHER: May I get these books out of the way, please, Your Honor?

THE COURT: Yes.

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MR. LAUGHLIN: Your Honor, I think, for the record to be clear, of course I want to also enter my objection.

THE COURT: It doesn't affect you, Mr. Laughlin.

MR. LAUGHLIN: Well, I think anything in this type of case --

1925 THE COURT: Mr. Laughlin, it does not affect you. I have heard from counsel representing Mr. Forte.

MR. LAUGHLIN: May the record show that I want to state my position, and Your Honor has precluded me.

THE COURT: Very well.

MR. GARBER: May I make one remark so that the record will be clear, Your Honor: I don't believe there has been any evidence here from witnesses as to the terms of court in Maryland -- in the Maryland court --

THE COURT: Give me the Code, Mr. Lowther.

MR. LOWTHER: What Mr. Garber is saying, Your Honor, is this: I want to advise the Court that where I get my information as to the terms of court in 1955, it was obtained from an Assistant United States Attorney in Maryland, who called the Clerk of the Baltimore Court, and he had him on the phone in his office when he was talking to me this morning.

THE COURT: I thought you had it from the Code. Don't you have anything that this Court can take judicial notice of?

MR. LOWTHER: Of the terms of the court?

THE COURT: Yes.

1926 MR. LOWTHER: Not right now, sir. I assure Your Honor that those were the terms, the second Monday in January, the second

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Monday in January, the second Monday in May.

THE COURT: I realize that, Mr. Lowther. I don't question at all the assurances you are giving this Court, but I don't think that this Court can take that sort of hearsay. They may be set out in the Code you were reading from.

MR. LOWTHER: No, they weren't. I assure Your Honor, if you will give me, say, an hour or an hour and twenty minutes, I will have them over here under the certificate of the Clerk -- that information -- and I wouldn't want to ask these questions until I have it.

THE COURT: I will give you the time.

MR. LOWTHER: Thank you.

MR. LAUGHLIN: In view of that, why not go over until tomorrow?

THE COURT: We are going right on. When the time comes for Mr. Lowther to ask that question, he can let the Court know, and we will adjourn.

MR. LAUGHLIN: We will have the chance after that is done to cross-examine the witness he has produced?

THE COURT: I don't think he is going to produce any witness. I think he is going to do that by certificate, is that it?

1927

MR. LOWTHER: I am.

MR. LAUGHLIN: I am not sure you are conversant with the procedure. As I understand it, in Baltimore a judge assigned to criminal is assigned, not for three years, but a full calendar year -- that is the practice. I don't think it varied. If there is any question about that, I think we should --

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THE COURT: We are not interested in who was assigned to what court, are we, Mr. Laughlin? We are interested in the terms of court, if the terms of court running from May 1 to September 1 and from September 1 to whatever the next period is -- it doesn't matter whether one judge is sitting during the period. It is whether the terms end, and he has the power to act thereafter.

MR. LAUGHLIN: Well, Your Honor, as I understand, in Maryland a judge has control and supervision over a sentence almost during its duration.

THE COURT: That isn't the way Chief Judge Marbury read it. At least in this case, Czapinski, -- whatever it is, I can't pronounce it -- the writ of habeas corpus case -- it speaks of a term -- at the expiration of the term of the court, the trial court, the criminal court, lost its jurisdiction.

1928 MR. LAUGHLIN: If Your Honor takes this view, it shouldn't be done hastily. We should have an opportunity to research this question.

THE COURT: In the first place, Mr. Laughlin, you are not counsel for Mr. Forte. Mr. Garber is his counsel, and he has researched it. He gave me a book here yesterday.

Proceed. Bring the jury out.

MR. LOWTHER: Your Honor, I'm sorry, but I misunderstood Your Honor when you said you would give me time. I'm practically at the point where I can use those now.

THE COURT: I guess the jury -- Mr. Garber and Mr. Laughlin, you request that we adjourn until tomorrow morning, is that right?

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MR. LOWTHER: I was under a misapprehension that when you said you would give me time, you meant now.

THE COURT: I thought you had something else, that's the reason. I will give you the time, just as I gave Mr. Laughlin and Mr. Garber time.

We are going to have this jury fully informed with respect to both sides of this case.

Do you want this case continued until tomorrow morning?

\* \* \*

1929 THE COURT: Have you got those requests for instructions?

MR. LAUGHLIN: Since Your Honor continued this until tomorrow, I hope -- it may be necessary to have more. Yes, I was prepared.

THE COURT: I guess, Mr. Laughlin, we will simply add the number. I forgot what the last number was.

MR. LAUGHLIN: That's my fault. I am not so sure I have those with me.

THE COURT: I think I have them here.

MR. LAUGHLIN: Your Honor, I always make it a practice to give the reporter a copy of them.

THE COURT: Your last one was Number 29, so this will be 30 and the other 31.

MR. LAUGHLIN: Nos. 30 and 31.

THE COURT: Now, Mr. Lowther, I notice that you have now given me four requests for instructions.

1930 Your first one is Government's Requested Instruction to

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Charge the Jury on Conspiracy.

What I am going to do is put "No. 1" on this.

MR. LOWTHER: Yes.

THE COURT: Mr. Laughlin and Mr. Garber, if you will take what is called Government's Request to Charge the Jury on Conspiracy, and just put "No. 1" after the word "conspiracy."

Then so far as the requested instruction -- and Mr. Lowther has that -- that becomes Government's Proposed Instruction No. 2. We have got that one all right.

We'll make Government's Requested Instruction Regarding the Witness Fees Paid to Bernice Gross "No. 3." After the "Gross," put "No. 3." That will be the identifying number.

Then the other one has a block for a number. Put "No. 4" in there.

MR. LAUGHLIN: Very well, sir.

\* \* \*

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2020 (Counsel for the United States having been heard:)

THE COURT. Well, I am ruling against you, Mr. Lowther.

What I am going to do, I am changing the views I expressed yesterday, gentlemen. I will not permit to be received in evidence, for the question of the defendant Forte's credibility, the Baltimore City Criminal Court conviction which was subsequently rescinded and he was placed on probation before verdict.

However, as Mr. Garber and the defendant Forte well knew before Mr. Forte took the stand, the North Carolina conviction may be received in evidence with respect to the question of the defendant Forte's credibility--with, of course, under the Richards case, the defendant Forte's counsel being able to bring out that a pardon was issued. So we limit it to that.

I do this, gentlemen, with the Luck case in mind; and, to reiterate what I said the other day, I exercise my discretion in allowing in the North Carolina conviction. In the case being tried here today, credibility is a very important question--the credibility of Bernice Gross, the credibility of Allan Forte. The jury now have had the benefit of hearing both sides. The jury have had the benefit of testing the credibility of

2021 Bernice Gross with the matter of her police department dismissal, her perjury before the grand jury, and her cooperation with the United States Attorney. In my opinion, in exercising my discretion, I think the

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jury have an equal right now to consider the credibility of Allan Forte in connection with the conviction of abortion in North Carolina back in 1943 or 1944.

MR. LOWTHER. Will you give me a moment to get these books out of the way, Your Honor?

THE COURT. Certainly.

MR. GARBER. Your Honor, may I address the Court regarding the North Carolina conviction, to make sure the record is perfectly preserved as far as the defendant Forte is concerned?

I have previously expressed to the Court the remoteness of the conviction in the Luck case, and the Court has expressed its rulings and its views as far as Luck is concerned. Also attention has been called to the Richards case, where Judge Washington in his opinion held that the Presidential pardon in that case did not preclude the defendant being asked on cross-examination whether or not he had in fact been convicted.

I would like to make this observation, though, and I am sure the Court has observed it. In the Richards case, the pardon that was  
2022 involved in that case flowed from an Executive Order of the President.

THE COURT. An amnesty.

MR. GARBER. An amnesty statute. And therefore any person, as I interpreted that case, who had more than one year of honorable military service during World War II, was eligible for a pardon of any

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offense against the laws of the United States. And that pardon did not consider, one way or another, the man's guilt or innocence of the crime charged.

THE COURT. Does your pardon say this man was innocent and was improperly convicted?

MR. GARBER. I think, Your Honor, this.

THE COURT. I asked you a question. What does it say?

MR. LOWTHER. May I inform the Court, if Your Honor please?

THE COURT. Do you have the pardon there?

MR. LOWTHER. I do, sir.

THE COURT. Very well, sir.

MR. LOWTHER. (Reading:)

"To all who shall see these presents, Greetings.

"Whereas, A. U. Forte, Colored, at the March Term, 1942, of the Superior Court of Forsyth County, was convicted of abortion and by judgment of said court was sentenced to 12 months on the 2023 roads, suspended on certain conditions, including payment of fine and costs, not practice chiropractory in Forsyth and contiguous counties, be of good behavior, and not violate the State laws for four years, and

"Whereas it has been made to appear to me that the case is one fit for the exercise of executive clemency,

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"Now, therefore, I, R. Gregg Cherry, Governor of the State of North Carolina, in consideration of the premises and by virtue of the power and authority vested in me by the constitution of the State, do by these presents pardon the said A. U. Forte, upon the condition that this pardon shall not extend to any other offense whereof the said party may have been guilty.

"In witness whereof I have hereunto set my hand and seal."

And the date, it's '48, of the year of our Lord, and of the State the 72d--no, of American independence--"R. Gregg Cherry, by the Governor."

THE COURT. Judge Washington spoke about the only possible pardon--

MR. GARBER. Correct.

2024 THE COURT. --being one where the man was never guilty. You don't have that.

MR. GARBER. Well, I would like to bring this out for the record. In explaining that conviction--and I think Dr. Forte would be permitted to testify on that aspect.

THE COURT. No, sir. He is going to be able to testify that he was pardoned. We are not going to try the abortion case in North Carolina.

MR. GARBER. May I make a proffer for the record, Your Honor?

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THE COURT. Yes, sir.

MR. GARBER. If Dr. Forte were permitted by the Court to testify concerning the circumstances of that conviction, I would expect that he would testify that when he appeared in court down there he appeared with an attorney; there was also a state's attorney and the judge. Dr. Forte, not knowing the legal terms, was advised and told to enter a plea of nolo contendere; and that, in words to that effect, that nothing was going to happen to him.

He would testify that he didn't know what a plea of nolo contendere was; he acted on the advice; the plea was entered; and he received no jail time, fine, or any such sort; and was committed to the court.

That when he subsequently came to the State of Maryland, 2025 he found out by consulting counsel over there exactly what the effect of a plea of nolo contendere was, and that in the end result, when a plea of nolo contendere is accepted by the court, a finding of guilty or verdict of guilty is entered. On receiving that advice, counsel there arranged to secure the executive pardon of which the Court has just been apprised.

Now I think that he should be permitted--

THE COURT. Just a minute. Is that the end of your proffer?

MR. GARBER. Yes, sir.

THE COURT. You object to it?

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MR. LOWTHER. I do, sir.

THE COURT. Sustained.

\* \* \*

2027 THE COURT. Yes, Mr. Garber; you have a further observation?

MR. GARBER. Yes, Your Honor. Of course, regarding the Richards case, which apparently seems to be the case in the District of Columbia, --

2028 THE COURT. It's the only case, and certiorari was denied; and it never, as far as I can find, has been raised again.

MR. GARBER. If Your Honor please, that case was decided some 14 years ago, if my memory serves me correctly. And there was a dissent in that case by Judge Fahy. Now of course I know this Court is bound by the majority opinions of the appellate court of this circuit. However, sometimes appellate courts do reconsider their prior ruling at a later date.

THE COURT. But they do it, though, rather than this Court.

MR. GARBER. Yes, Your Honor; I realize that, that this Court's power is to follow the law as enunciated, and any change must be left up to that appellate court. However, for the purpose of preserving this record, I would formally object to the defendant being asked about that North Carolina conviction, on these grounds. I am relying principally

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on the arguments advanced by Judge Fahy in his dissent in the Richards case.

THE COURT. I think we understand that. You have made the formal objection a number of times, Mr. Garber; and I am sure that, as and when it's necessary, the Court of Appeals will recognize that you have certainly preserved your grounds. You are objecting to any evidence of the defendant's prior conviction in North Carolina, for which he was subsequently pardoned.

MR. GARBER. Now, that may stand as an objection when the question is asked? It will not be necessary for me to object then?

THE COURT. You will not have to. And also, so that we will have no confusion, you may then on redirect bring out from the defendant that yes, he was convicted in North Carolina; and, as I understand your proffer, it went something like this, that he was brought into a court there, and was not represented by counsel?

MR. GARBER. He was represented by counsel.

THE COURT. He was represented by counsel; that it was recommended to him that he enter a plea of nolo contendere; and, without appreciating what nolo contendere meant, he was convicted on his plea of nolo contendere?

MR. GARBER. Correct.

THE COURT. You will not go into the punishment that he suffered.

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MR. GARBER. No.

THE COURT. And under the views stated in the Boyer case, he may protest that he was innocent. But he may not go into how he was innocent, and--

2030 MR. GARBER. That's correct.

THE COURT. You understand that.

MR. GARBER. Now, if Your Honor please, taking into consideration this conviction back in 1942, and the passage of time, equating that with the views of the court in the Luck case, and also considering the fact that there was a pardon of that 1942 conviction, I submit that the question of that conviction should not be asked him on his cross-examination, because--

THE COURT. You're going to be repetitive, aren't you? I have been hearing this a number of times .

MR. GARBER. No. I didn't make this one point, Your Honor. I would like to make this one point.

THE COURT. All right.

MR. GARBER. It would certainly seem that the purpose of asking a question on cross-examination of the prior convictions is to go to the credibility of the witness, whether he is worthy of belief. But in view of the fact of the passage of time, and the fact of an executive pardon by the governor of a state, the fact of that prior conviction, it would seem

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to me, would have doubtful weight as to an attack on credibility; and therefore I would object to it on that further ground.

THE COURT. Very well. Bring in the jury.

2031 MR. LAUGHLIN. And, Your Honor, just so the record will show that I of course also join in it.

THE COURT. Yes; you subscribe to Mr. Garber's views.

And you understand the Court's ruling on this, Mr. Lowther.

MR. LOWTHER. I do, Your Honor.

\* \* \*

CROSS EXAMINATION  
(RESUMED)

BY MR. LOWTHER:

\* \* \*

Allan Forte - Cross Examination

2037 Q Now, your middle initial is U, is it not?

A Correct.

Q And how do you pronounce your middle name, sir?

A Unphravale.

Q And that's U-n-p-h-r-a-v-a-l-e? Is that right?

A Correct.

Q Pronounced Unphravale?

A Yes.

Q Now, did you ever live in the State of North Carolina?

A Yes.

Q Now then, are you the same Allan U. Forte who, in March of 1942, under the name of A. U. Forte, in North Carolina, was convicted of abortion?

A Yes, I was, but I was later pardoned by the Governor.

Q Just a minute. Are you the same individual, under that name, who in North Carolina in 1942 was convicted of abortion?

A Yes.

Q I have no further questions of you, sir.

\* \* \*

Allan Forte - Redirect Examination

2039 BY MR. GARBER:

Q Now, Dr. Forte, you were asked on cross-examination concerning a conviction in 1942, in the State of North Carolina. Do you recall that, sir?

A I do.

Q Now would you explain, Doctor, exactly what the circumstances were, briefly, surrounding that conviction?

A During the pending of the trial, I appeared in the Superior  
2040 Court, my lawyer--my two lawyers--and the solicitor. We were ushered into the judge's chamber. And the lawyer said to me, "I am a Naval Reserve officer, and I have been suddenly called into active service," he said, "and I am making a suggestion, which the solicitor agrees with, that you accept a plea of nolo contendere."

I said, "What is that?"

And he said, "Oh, it's a plea in which we dismiss the case."

Q Did you enter such a plea?

A I took the plea, because I didn't know what it meant. And, as I said, the solicitor and we had agreed; and I accepted it. He said, "It's better for you to accept this and get a suspended sentence, because"--he had already mentioned, "you no longer want to reside in the state." And he said, "It is better for you to accept this, rather than be serving time in the North Carolina penitentiary."

Allan Forte - Redirect Examination

Q So you did that; is that correct?

A I accepted it.

Q Now, subsequently, after you left the State, did you do anything regarding that conviction?

A Yes. When I came to Maryland, --

MR. LOWTHER. Just a minute, if the Court pleases. I object to that.

THE COURT. I sustain it.

2041 MR. GARBER. Can I ask him a direct question, then?

THE COURT. You mean a leading question?

MR. GARBER. This was the foundation for something else, Your Honor. May we approach the bench?

THE COURT. Come to the bench.

(At the bench:)

MR. GARBER. What I am trying to show, Your Honor, is that he engaged someone to seek a pardon from the governor of the state.

THE COURT. Just ask him whether or not he was ever pardoned.

MR. GARBER. All right, sir.

(In open court:)

BY MR. GARBER:

Q Dr. Forte, were you ever pardoned by the Governor of the State of North Carolina for that?

Allan Forte - Redirect Examination

A Yes.

Q And when was that?

A Oh, I just can't recall now. I think it was in '44 or '45, some time thereabout.

\* \* \*

2048 THE COURT. I have here, gentlemen, 33 of the Defendants' requested instructions. And I am assuming, both Mr. Laughlin and Mr. Garber, these are joint requests. Is that right?

MR. LAUGHLIN. Yes, sir.

MR. GARBER. Correct, sir.

THE COURT. And each one of them is a joint request by both defendants?

MR. GARBER. Yes, sir.

MR. LAUGHLIN. Yes, sir.

2049 THE COURT. Then I have, I believe it is, four requests for instructions by the Government. Am I correct on that, Mr. Lowther? It is just four, is it not, sir?

MR. LOWTHER. Correct, sir.

THE COURT. All right. I am going to start ruling, then. I have gone over these, I might say, gentlemen. It is not something I am looking at for the first time.

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MR. LAUGHLIN. I understand that, except possibly the last two, Your Honor.

THE COURT. Yes--and I just looked at those; but I will look at them again.

MR. LAUGHLIN. I understand, Your Honor.

THE COURT. So far as Defendants' instructions 1, 2, 3, 4, 5, 6 and 7 are concerned, I am denying them.

I am denying Defendants' instructions--and when I say "instructions," I mean requests for instructions 8, 9, 10, 11 and 12. And 13 and 14 are denied.

As far as Defendants' Request for Instruction 15 is concerned, while I am denying it in this form, I am covering it in my own charge. I will simply indicate here, "Denied; but see charge."

MR. LAUGHLIN. Would Your Honor care to tell us in what manner?

THE COURT. Yes. Well, I'm going to read the whole charge, when I get through here.

2050 MR. LAUGHLIN. Oh, I see.

THE COURT. But I don't want you to think I am not conscious of what this problem is.

MR. LAUGHLIN. I understand.

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THE COURT. Right now, Defendants' Requestion for Instruc-  
tion 15, "Denied; but see charge."

Defendants' 16, the same thing, "Denied; but see charge."

Well, I am denying 17, but I am going to treat with the matter  
of her concern about her plight in my charge.

MR. LAUGHLIN. I didn't understand what Your Honor said.

THE COURT. I am denying 17, but I am treating with the  
concern of Bernice Gross with her own plight, in my own charge.

No. 18 is denied.

With respect to 19, Mr. Laughlin, I am denying it as it is  
stated here, but I am treating it in my charge--"Denied; but see charge."

Denied--20.

Denied--21.

Denied--22.

Denied--23.

Of course, 24 isn't even in this case.

2051 MR. LAUGHLIN. I didn't hear you.

THE COURT. Twenty-four isn't even in this case, is it, the  
Birge count? That went out on a motion.

MR. LAUGHLIN. I suppose not.

THE COURT. Denied.

Denied, 25.

Denied, 26.

Denied, 27.

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Denied, 28. Of course, I think Sergeant Wallace was as peculiarly available to the defendants as he was to the Government.

MR. LAUGHLIN. What was that, Your Honor?

THE COURT. Wallace was as available to--

MR. LAUGHLIN. Well, Your Honor, anyway that's your ruling. But we can't agree with that. He would have been hostile to us.

THE COURT. But that doesn't make him unavailable.

MR. LAUGHLIN. Your Honor feels it is a matter of argument; is that right?

THE COURT. No, it's not a matter of argument. You are not going to say he was unavailable to you.

MR. LAUGHLIN. No, no. But, I mean, we can argue that Wallace was not produced.

2052 THE COURT. Oh, no, sir; you cannot argue that. You cannot argue that he was not produced, because you had a right to produce him.

MR. LAUGHLIN. Well, I must disagree with Your Honor that we wouldn't have a right to argue that.

THE COURT. I think the Court could interrupt at that time and say, "Ladies and gentlemen of the jury, Sergeant Wallace was subject to the subpoena by any party here."

In one of your requests for instructions, speaking about this matter, you say witnesses are not partisans and should be available to all parties.

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MR. LAUGHLIN. Yes.

THE COURT. And he was available to you. All you had to do was subpoena him.

MR. LAUGHLIN. Yes. But here's a man, Your Honor, who has been accused of bribery.

THE COURT. He may have been accused of a lot of things, but he was still available to you. You may not argue that he was unavailable to you.

MR. LAUGHLIN. Well, Your Honor, will you hold that and let me present that to you Monday?

THE COURT. Twenty-nine is denied.

I am denying 30 and 31; but of course I am treating the subject-matter in my charge.

Denied, 32.

2053 Denied, 33. And in that connection I go immediately to Government's 4; I am denying it.

MR. LAUGHLIN. What is that, Your Honor?

THE COURT. I am also denying Government's 4, which is the other side of the coin of your 33, I believe.

With respect to the Government's request for charge to the jury on conspiracy, No. 1, in substance I am stating it in my own charge. Therefore I am writing along the margin on the first page, "Denied; but see charge."

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With the modification I shall now indicate, I am going to grant Government's requested or proposed instruction No. 2.

And let me ask you, Mr. Laughlin and Mr. Garber, at this time: I notice that in the first trial, when Judge Hart was charging the jury, he did not--and I believe he had an understanding with counsel before--he did not read some 63 overt acts when he read the first count of the indictment. Do you remember that?

MR. LAUGHLIN. I don't remember it, Your Honor.

THE COURT. Do you want them read? They are going to get a copy of the indictment.

MR. LAUGHLIN. I see no purpose in having them read, Your Honor.

THE COURT. I don't, either.

2054 Do you, Mr. Garber, want them read?

MR. GARBER. No, Your Honor, I don't want them read.

THE COURT. Do you want them read, Mr. Lowther?

MR. LOWTHER. No, Your Honor.

THE COURT. In other words, then when I get to the first count of the indictment, --

MR. LAUGHLIN. Well, Your Honor, in other words you deny all our prayers, and--

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THE COURT. Well wait a minute. I'm working now on the Government's prayers, and I've gotten to this point, now, Government's requested instruction No. 2, and I'm telling you how I am modifying it. I shall now give Government's Proposed Instruction No. 2 as modified as follows:

The first paragraph as it appears there will be given.

Beginning with the second paragraph, the quoted part is the count 2 of the indictment as read by Judge Hart.

This proposed instruction No. 2 of the Government is in essence from Judge Hart's charge in the first trial?

MR. LOWTHER. It is, Your Honor.

THE COURT. Of course, I shall read myself from the indictment, as to Count 2.

Now when the case was tried the first time, and at this point  
2055 of Judge Hart's charge, after having read Count 2, Judge Hart then put the question to Mr. Garber, who was then representing Mr. Laughlin, "Do you wish to have Count 4 read in its entirety?" Mr. Garber stated no, that would not be necessary.

Now I ask you, Mr. Laughlin, after reading Count 2, do you want Count 4 read?

MR. LAUGHLIN. Well, Your Honor, let me say at this point, I am a little concerned that Your Honor is relying so heavily on what took place. That was a nullity.

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THE COURT. That may have been a nullity; but the Court of Appeals said he gave a proper charge in at least one aspect.

MR. LAUGHLIN. No, I don't agree with the Court of Appeals.

THE COURT. All right, you may not agree, maybe, but that's what I am going to do.

MR. LAUGHLIN. Yes.

THE COURT. Now, do you want me to read Count 4 verbatim, or do you want me to use the language such as in this proposed verbiage here, in essence the statement by Judge Hart when Mr. Garber said he did not desire to have Count 4 read? --in other words, after Count 2 was read, this language:

"Count 4 charges the defendant Laughlin alone in substantially the same language except that it alleges that the acts occurred between April 15, 1962 and February 20, 1963, whereas against Forte in Count 2 it is alleged that the acts occurred between September 1, 1961 and February 20, 1963."

Do you desire the full count read?

MR. LAUGHLIN. No, I do not request that, Your Honor.

THE COURT. Very well. Then I shall treat it as I just read it here.

And I will continue reading from the Government's Proposed Instruction No. 2, down to page 4, in the last paragraph of page 4. That paragraph starts:

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"Now with respect to Counts 2 and 4 of the indictment, if the jury should find"--

and I am inserting--

"beyond a reasonable doubt that, as charged in Count 1 of the indictment, a conspiracy to corruptly endeavor to influence Mrs. Smith in fact existed"--

and I'm inserting--

"And that defendants Forte and Laughlin were members of the conspiracy, "--

and I leave the rest of that paragraph as it is, except when I get down to the next to the last line I make "conspirator" plural--"conspirators"-- and I add, after "Title 18," "United States Code."

2057        So I am granting it as modified.

MR. LAUGHLIN. Of course, Your Honor, let the record show, as far as I am concerned, I object that this should be granted in any form. Since all of ours are denied, we believe it should be "Denied, and see charge."

THE COURT. All right. Well, it's going to be granted that way; and I understand it is with your agreement that I need not read Count 4, --

MR. LAUGHLIN. That is correct.

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THE COURT. --and may make reference that it is in essence the same as Count 2 except with the difference in the period of time.

MR. LAUGHLIN. That is correct.

THE COURT. Very well.

As to Government's request for instruction No. 3, I am granting it.

With that, gentlemen, here is your charge.

MR. LAUGHLIN. What have we done with respect to Government's 4?

THE COURT. I denied that. I said that was the counterpart of your thirty--the last one, I think.

MR. LAUGHLIN. What is going to be your instructions as far as Wallace is concerned, Your Honor?

THE COURT. You mean the availability?

2058 MR. LAUGHLIN. No. What are you going to say to the jury as to Wallace?

THE COURT. I assume that you are both going to argue as to what Mr. Wallace means to each one of you.

MR. LAUGHLIN. But based on what you said, you said I can't argue they should have called him. Would Your Honor tell us what your charge is going to be now?

THE COURT. I'm going to give you that right now.

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MR. LAUGHLIN. Very well.

MR. LOWTHER. Would you excuse me a moment before you do, please?

THE COURT. Yes, surely.

MR. LOWTHER. Thank you.

THE COURT. Needless to say, gentlemen, it is going to be starting as all the charges start--the function of the judge, jury, counsel --and I am sure none of you need me to read that. When I get to such parts as you want to have read, let me know. But a lot of this you hear--

MR. LAUGHLIN. I can understand that, yes, sir.

THE COURT. The function of the jury.

No sympathy, prejudice or passion.

The jury to follow the law as charged.

The indictment is notice; it is not an inference of guilt.

2059 The presumption of innocence.

Reasonable doubt.

I will read this, because there has been some change in recent times. There was some Court of Appeals case, I think, in the last year, 1964, the Jones case--

"Every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to a defendant throughout the trial. The burden is on the Government to prove

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a defendant guilty beyond a reasonable doubt, as to every element of the offense, as those elements will be explained; and if the Government fails to sustain this burden, then you must find the defendant not guilty.

"You may well ask, what is meant by the phrase, 'a reasonable doubt.' It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty and not necessarily proof to a mathematical certainty. A reasonable doubt is one which is reasonable in view of all the circumstances. Therefore if after impartial comparison and consideration of all the evidence you can candidly say that you have such a doubt as would cause you to hesitate to act in matters of importance to yourselves, then you have a reasonable doubt. But if after such  
2060 impartial comparison and consideration of all the evidence, and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would not hesitate to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt."

And I shall add, when I use the word "defendant" here, that I mean with respect to each defendant.

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Circumstantial evidence, gentlemen, the classical charge. Unless somebody wants to hear it, I won't read it to you.

The basic credibility-of-witness charge you have heard time and time again; but there will be more particularly with this in a moment or two. Unless you want to hear it, I'll pass that.

The number of witnesses does not control.

A witness is presumed to speak the truth--and it may of course be overcome.

Inconsistent statements. And it is the same charge that I gave the jury on the two occasions that there were two inconsistent statements, in the Court's view, of Mrs. Gross at the time of her testimony.

2061 And I will simply state that in this case there were two prior inconsistent statements.

Credibility--

"Now, it is the settled law in this country that accomplices in the commission of a crime are competent witnesses, and the Government has the right to use them as witnesses. In this regard I refer to the testimony of Bernice Gross. It is the duty of the Court to admit their testimony and it is your duty to consider it. It should be received with caution and scrutinized with care. The degree of credibility which you should give to such testimony is a matter exclusively within your jurisdiction.

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"You may, as a matter of law, convict a person accused of a crime upon the uncorroborated testimony of an accomplice, but you should do so only after you have carefully and cautiously scrutinized such testimony. If you find that an accomplice is substantially corroborated by independent evidence with respect to material parts of his or her testimony, you should give the entire testimony such weight as in your opinion it deserves.

"Now, the witness Bernice Gross has admitted that she gave perjured testimony before the Grand Jury in her first appearance before that body on March the 1st, 1963. You are instructed that the testimony of an admitted perjurer should be considered with caution and weighed with care.

"In connection with the testimony of Bernice Gross you may also consider, in judging her credibility, whether she is in fear of prosecution and whether she expects leniency by the Grand Jury of the United States Attorney's Office, and if so, whether or not that affects her credibility in any way.

"There has been evidence in this case that the witness Bernice Gross was paid a total of \$378.88 by the United States Marshal's Office in the District of Columbia for appearances in this District. You are instructed that this amount of money represents witness fees to which witnesses are entitled by law,

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and that witness fees are required by law to be paid to any witness who appears as a witness for the Government."

"The law does not compel a defendant to take the witness stand and testify."

This goes to the defendant Laughlin.

MR. LAUGHLIN. I will ask that that not be given, Your Honor.

THE COURT. You desire not to have it given?

2063 MR. LAUGHLIN. Yes, that's right.

THE COURT. Do you have any views on that, Mr. Lowther.

MR. LOWTHER. If a defendant does not want it given, Your Honor, I suppose it should not be given.

THE COURT. That one will not be given.

This goes to the defendant Forte:

"You are instructed that while the law makes the defendant Forte a competent witness in this case, yet you have a right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as in your judgment it is fairly entitled to receive.

"The fact that the defendant Forte has a criminal record has no bearing on the question of guilt or innocence of the charges on which he is being tried. The law, however, admits the criminal

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record of any person who takes the witness stand, solely for the purpose of assisting the jury in determining whether or not to believe the witness. Any fact which may tend to show that a witness may not be a truthtelling individual is admissible in  
2064 respect to such witness, whether the witness is a defendant or anyone else. Consequently you may consider the defendant Forte's criminal record, not as bearing on the question of his guilt or innocence, because his guilt must be established by evidence, irrespective of what his past may be. You may consider his criminal record merely for the purpose and as a help in determining whether he was a trustworthy witness when he took the witness stand and whether his testimony should be believed."

"If you should find that any witness knowingly testified falsely as to any material fact about which he could not have been mistaken, you are at liberty, if you deem it wise to do so, to disregard the entire testimony or any part of the testimony of such witness, except where corroborated by other credible testimony."

"When you retire to the jury room to deliberate on this case, you will be given a copy of the indictment to take with you. That indictment reads as follows."

I will then read Count 1, after which this is the charge that will be given.

\* \* \*

Proceedings

2085 THE COURT (continuing): And then, gentlemen, there will be the usual closing--"you take this case and give it serious consideration," select a foreman, and the unanimous verdict.

MR. LAUGHLIN. Your Honor, permit me to say, I think your statement on the law of conspiracy has ignored the Supreme Court's decision, and it appears to me it's trying to lift the Government's case up by its own bootstraps. And as I say again, I am a little surprised that Your Honor is weighing so heavily, leaning so heavily on Judge--it's too bad you have that transcript of Judge Hart. That was a nullity. Of course, as to that, as I said before, it would be for another forum. And I have particularly in mind the statements of the Supreme Court in various cases. Mere meeting between defendants cannot be construed as a beginning of a conspiratorial relationship.

THE COURT. That's in there.

2086 MR. LAUGHLIN. Mere association, --

THE COURT. That's in my charge.

MR. LAUGHLIN. --or acquaintanceship, of one defendant with another, does not establish the existence of a conspiracy.

THE COURT. That's in my charge.

MR. LAUGHLIN. "In considering whether or not one or both defendants on trial was or were members of the conspiracy charged, you must do so without regard to and independently of the statements, acts and declarations of others in his absence."

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Then--and, of course, mere association, and so and so.

Now, Your Honor, I was just a little surprised when you were referring to the perjury committed by Gross. You confined it to her admission of perjury in her first appearance before the Grand Jury. Your Honor completely overlooked that she also admitted she committed perjury in her second appearance.

\* \* \*

2099 THE COURT. I have to correct that.

MR. LAUGHLIN. Then how about her testimony, Your Honor, --

THE COURT. Now wait a minute. Let's get one thing at a time. What I am going to say here--as I had it read, because I figured there was just that one admission:

"Now, the witness Bernice Gross had admitted that she gave perjured testimony before the Grand Jury in her first appearance before that body on March the 1st, 1963."

I am changing that to both appearances on March 1963 and in an appearance before the Grand Jury in March of 1964.

MR. LAUGHLIN. Yes, sir.

THE COURT. And then it goes on:

2100 "You are instructed that the testimony of an admitted perjurer should be considered with caution and weighed with care."

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MR. LOWTHER. Your Honor, may I make a request? Your Honor has inserted, as I recall your words, "The witness Bernice Gross has admitted that she gave perjured testimony." Is that the phraseology Your Honor uses?

THE COURT. Yes, I think that's it--yes, "perjured testimony."

MR. LOWTHER. Would you consider, sir, inserting after "perjured testimony," "in some of her answers"? Because the way you have it there, sir, it's--

THE COURT. The whole thing.

MR. LOWTHER. That's right, sir, exactly.

THE COURT. I think that's proper.

MR. LAUGHLIN. What is Your Honor going to say about the answer she gave during the interrogation in Hannon's office?

THE COURT. Just a minute. I want to straighten this out. I am going to make it even more specific, that she admitted that in her two appearances before the Grand Jury on March 1, 1964, and one appearance before the Grand Jury on March 19, 1964, that she answered some of the questions propounded to her falsely.

2101 MR. LAUGHLIN. And admitted perjury.

THE COURT. Well, she admitted that she answered some of them falsely.

MR. LAUGHLIN. Which is perjury, yes.

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THE COURT. And then I come on and say, "You are instructed that the testimony of an admitted perjurer"--

MR. LAUGHLIN. That's right.

THE COURT. All right--

"Now the witness Bernice Gross has admitted that in her two appearances before the Grand Jury on March 1st, 1963, and in her one appearance before the Grand Jury on March 19, 1964, she answered some of the questions falsely. You are instructed that the testimony of an admitted perjurer should be considered with caution and weighed with care."

MR. LAUGHLIN. Now, Your Honor, what is Your Honor going to say as to her interrogation in Hannon's office?

THE COURT. I said:

"In connection with the testimon of Bernice Gross, you may also consider in judging her credibility whether she is in fear of prosecution and whether she expects leniency by the Grand Jury and the United States Attorney's Office and if so whether or not that affects her credibility in any way."

2102        You have the testimony here. You argue it to them. I'm not going to argue it.

MR. LAUGHLIN. Also I think you should say that she testified here in this Court that she was still in fear.

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THE COURT. That she was what?

MR. LAUGHLIN. That she was still in fear.

THE COURT. That's for argument, sir. I say:

"In connection with the testimony of Bernice Gross, you may also consider in judging her credibility whether she is in fear of prosecution and whether she expects leniency by the Grand Jury and the United States Attorney's Office and if so whether or not that affects her credibility in any way."

The rest of it I leave to argument.

MR. LAUGHLIN. Your Honor is of the view, then, that what took place in Hannon's office was not under oath?

The Court. Of course it wasn't under oath.

MR. LAUGHLIN. Even though she later subscribed to it?

THE COURT. That was before the Grand Jury under oath.

MR. LAUGHLIN. But she made oath to what she said.

THE COURT. She was never under oath in Mr. Hannon's office.

2103 MR. LAUGHLIN. Well, Your Honor, if a long document is prepared, maybe today, and somebody comes in--

THE COURT. She was not under oath in Mr. Hannon's office, Mr. Laughlin. What else are you objecting to, sir?

MR. LAUGHLIN. I have nothing esle now.

THE COURT. What do you have, Mr. Garber?

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MR. GARBER. I have nothing else at this point, Your Honor.

MR. LAUGHLIN. Well, Your Honor, as to the matter affecting Dr. Forte in North Carolina, do you intend to give any cautionary instructions as far as I am concerned as to that?

THE COURT. I will give you that one that the defendant doesn't have to testify.

MR. LAUGHLIN. That wasn't what I asked you.

THE COURT. I am certainly not going to give a cautionary instruction as to that. It is his credibility that is on the line.

MR. LOWTHER. I am wondering if the defendant Laughlin is asking the Court to give an instruction along those lines.

MR. LAUGHLIN. If I have anything to say to Counsel Lowther, I'll say it, Your Honor.

THE COURT. Well, if you're going to request an instruction  
2104 along that line, you'd better request it. You are here before me, sir.

MR. LAUGHLIN. Yes, I know that. But of course, Your Honor, this doesn't preclude us from giving us anything additional Monday morning?

THE COURT. Monday morning; that's fine. I will leave it open for all of you.

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MR. LAUGHLIN. And also whether we might argue as to the failure to produce Wallace, I will try to research that tomorrow.

THE COURT. You mean the availability of the witness?

MR. LAUGHLIN. Yes, that's right.

THE COURT. All right. Make it ten o'clock Monday morning, gentlemen.

\* \* \*

(June 28)

2128 MR. GARBER. Your Honor, at this time I am going to make an objection to the form of this interrogation. I don't think he should read the examination of Dr. Forte. I think he should ask her in general questions, whether or not such and such a thing happened, because actually it is going to be her credibility that is involved, too, and it is what she remembers and not what is being read to her as something that was said.

THE COURT. I overrule the objection.

MR. LAUGHLIN. Your Honor, I want to join--

THE COURT. You join in it?

2129 MR. LAUGHLIN. I will add this, further: I understand it is not proper to read to a witness the testimony of another witness. I submit that it has to be done by questions. And you may recall I think this question came up in the interrogation of Mrs. Smith.

Bernice Gross - Cross Examination (Rebuttal)

THE COURT. But you were trying to read to Mrs. Smith what her testimony was in the prior trial, and I said see if she needs her recollection refreshed. That's what came up there, Mr. Laughlin.

MR. LAUGHLIN. Then I join with it.

THE COURT. Overruled.

\* \* \*

2143 Q And it is also a fact that you called Dr. Forte at his office in Washington? Is that not correct?

A When, Mr. Garber?

Q During the period between September and January of 1963.

A Yes, I did, yes, sir.

Q And there was an occasion when you called him at the Chesapeake Club, and you--strike that--you called him at his office in Washington and used the name, "Miss B"; is that correct?

A That is correct, yes, sir.

Q And, Mrs. Gross, is it not also a fact that during this period--September, October, November of 1962--that you were attempting to make some arrangement to get back on the police force for \$500?

A No, sir, that is not true.

2144 Q Did you ever tell anyone that you could get back on the police force for \$500?

A Yes, I did. I told them that if I had had the five hundred, I could get back, yes, sir.

Bernice Gross - Cross Examination (Rebuttal)

\* \* \*

2145 Q Now during the course of your examination by Mr. Lowther, he read to you, or read certain questions and answers to you from a transcript. Have you seen that transcript?

A Yes, I did.

Q When did you see it?

A Thursday of last week.

Q And under what circumstances did you see it?

A I was in Mr. Lowther's office, and he handed it to me to read it.

Q And you read it; correct?

A Yes, I did.

Q And when you took the stand today, you knew pretty well what questions you were going to be asked; is that correct?

A Well, I read it. I had read it.

\* \* \*

2148 BY MR. GARBER:

Q Mrs. Gross, do you as of this date still feel that you could be prosecuted?

A Yes, I do.

2149 Q And do you feel that it would be in your interest to cooperate with the Government?

Bernice Gross - Cross Examination (Rebuttal)

A I have cooperated up until now, and I still will.

\* \* \*

2150 CROSS EXAMINATION

BY MR. LAUGHLIN:

Q Mrs. Gross, you made the statement about \$500, to get back on the force. Who were you going to pay the \$500 to?

A I will not tell you that, Mr. Laughlin.

Q What's that?

A I will not tell you that, who I was going to pay it to.

MR. LAUGHLIN. Your Honor, I submit she should be required to answer.

MR. LOWTHER. I submit she should not be, Your Honor.

THE COURT. Come to the bench.

(At the bench:)

2151 THE COURT. Why should she?

MR. LAUGHLIN. Your Honor, I think if it was an honest answer, if she is not concealing anything, she should be required to answer it. Now at the last minute he injects my name into it.

THE COURT. Your name was injected into it in her examination in chief; that in your first meeting with her she told you who it was that the money was to be paid to. I sustain the objection. I don't see why she should be required to answer it now.

Bernice Gross - Cross Examination (Rebuttal)

MR. LAUGHLIN. Your Honor, this is of course a criminal case. I can't quite understand.

THE COURT. What is the difference? She said for \$500 she could get back on the force. I will sustain the objection.

(In open court:)

BY MR. LAUGHLIN:

Q Mrs. Gross, are you still trying to get back on the police department?

A No, I am not. I wasn't then.

Q Are you trying now?

A No, sir, I'm not.

Q Were you trying in the month of January and February of this year?

2152 A No, sir, I was not.

\* \* \*

2154 MR. LAUGHLIN. Your Honor, may I read it to the jury?

THE COURT. You may read it.

MR. LAUGHLIN (reading):

"Executive Department, Annapolis, Maryland Copy

"February 2d, 1965.

"Mrs. Bernice Gross, c/o Hecht Company, Northwood,  
1600 Havenwood Road, Baltimore, Maryland, 21218

Bernice Gross - Cross Examination (Rebuttal)

"Dear Mrs. Gross:

"Governor Tawes has asked that I acknowledge your recent letter in which you requested his assistance in being reinstated with the Baltimore City Police Department. The Governor can certainly appreciate and understand your wishes; but this is a matter that you should discuss with Police Commissioner Smith.

2155 It would be most inappropriate for the Governor to act in this matter without the advice and guidance of the Commissioner.

"With kindest personal regards, I am

"Sincerely yours

"Egner J. Johnson, Executive Assistant to the Governor."

\* \* \*

2156 MR. LAUGHLIN. Your Honor, what I wanted to discuss with you, Your Honor mentioned the other day what your instruction would be on accomplice. Does Your Honor have it handy, as to accomplice?

THE COURT. Yes, sir, I have it. I'll tell you where it comes from--Cominetti versus United States, 242 U. S. 470, 495; Mendelson versus United States, 61 Appeals, D. C. 127, 129. It reads as follows:

"Now, it is the settled law in this country that accomplices in the commission of a crime are competent witnesses, and the Government has the right to use them as witnesses. In this regard I refer to the testimony of Bernice Gross. It is the duty of the

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Court to admit her testimony and it is your duty to consider it.

It should be received with caution and scrutinized with care.

2157 The degree of credibility which you should give to such testimony is a matter exclusively within your jurisdiction.

"You may, as a matter of law, convict a person accused of a crime upon the uncorroborated testimony of an accomplice, but you should do so only after you have carefully and cautiously scrutinized such testimony. If you find that an accomplice is substantially corroborated by independent evidence with respect to material parts of her testimony, you should give the entire testimony such weight as in your opinion it deserves."

Now there is some more; but that goes to the perjury aspect.

MR. LAUGHLIN. Yes. And now, Your Honor, in connection with that, I would like to pass up to you Defendants' Prayer 34 (copies being distributed).

Now, Your Honor, --

THE COURT. Let me read it.

MR. LAUGHLIN. Yes, read that, and then--

THE COURT. And then I'll listen.

MR. LAUGHLIN. All right, sir.

THE COURT. I understand it.

[Discussion]

\* \* \*

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2162 THE COURT. All right, I'll add "then" in there. You said "then."

MR. LAUGHLIN. Yes. I think, Your Honor, since--

THE COURT. And also let us note that after the end of the quotes--"in your opinion it deserves"--the Court of Appeals said, "We are satisfied that the charge as given by the court on this phase of the case is all that is required and all that any defendant charged with crime and confronted by the testimony of accomplices has a right to ask." So I'm giving that.

MR. LAUGHLIN. Very well.

THE COURT. I'll put the word "then" in there.

MR. LAUGHLIN. Yes. All right.

2163 THE COURT. "You should 'then' give the entire testimony such weight as in your opinion it deserves."

MR. LAUGHLIN. Your Honor, I have another point to argue. Would you take a brief recess?

THE COURT. Yes. You have two points to argue. You have one about the missing witness rule.

MR. LAUGHLIN. Yes.

THE COURT. And you have the one about the matter of the conviction of crime of Mr. Forte. You said you were going to give me something on that.

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MR. LAUGHLIN. Well, I may be in error. I thought Mr. Garber may have said that.

THE COURT. No, you did, because you said, "Well, I'm involved here." So I said to you Friday, "If you've got a requested instruction, bring it in."

MR. LAUGHLIN. But--

THE COURT. So I'll wait for it.

MR. LAUGHLIN. But--

THE COURT. I'll take a ten-minute recess, gentlemen.

(Following the recess, the jury not in the courtroom:)

MR. LAUGHLIN. Your Honor, on Friday we were discussing the matter of the missing witness, and I raised the point--

2164 THE COURT. Before you get to that, --

MR. LAUGHLIN. Yes, sir.

THE COURT. --let me finish the job we were at before the recess, after we discussed the accomplice. I didn't tell you, but I am doing it now; I am denying the Defendants' Prayer 34, in the light of what we discussed.

MR. LAUGHLIN. Yes.

THE COURT. And also, lest I forget it, except this matter or two that you are going to take up with me right now, and I am going to listen to you further on that, all the rulings that I made on Friday,

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while we all agreed that we should consider the matter of the Court's charge and the requested instructions before Mrs. Gross was here, I ruled, and I reaffirm those rulings. I assume that counsel are reasserting their arguments; is that correct?

MR. LAUGHLIN. Yes, sir.

MR. GARBER. Correct, Your Honor.

THE COURT. And, Mr. Lowther, the same position as on Friday; is that right?

MR. LOWTHER. Yes, sir.

THE COURT. So that, in other words, we are now redoing what we did preliminarily on Friday.

MR. LAUGHLIN. Yes, sir.

THE COURT. Very well. Now I will hear you, sir.

2165 MR. LAUGHLIN. Your Honor, on this matter of commenting on a missing witness, as I understood, Your Honor's view was equally available--whatever the term is--to both sides. Now from the research that I did Saturday morning I think I can convince you, in the circumstances of the case, that we would be justified in commenting.

I first would like to call Your Honor's attention to United States versus Cotter. It's 60 Federal 2d 689. It's the Second Circuit opinion, written by Judge Learned Hand:

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"When both sides fail to call a witness who knows something of the facts, their conduct, like anything else they do, is a circumstance which a jury may use. If both can call him and he is impartial, ordinarily it will have little weight. If it appears that he would naturally side with one party, it is reasonable to expect that he does not use him for a good reason; and that is fair argument for the other. A judge is not required to intervene here any more than in any other issue of fact. But he is not charged with correcting their nons equiturs."

You know, I didn't know what that meant, Your Honor. I had heard it before. But I think it's something, in effect, of what logically follows from something before.

"The jury are to find these for themselves."

2166 Then there's another case, Your Honor, in the Second Circuit, also--United States versus Beekman.

THE COURT. Suppose you tell me what the facts are in the first case.

MR. LAUGHLIN. Well, Your Honor, I did not--I will in this latest case, recite the facts. Now, United States versus Beekman, the opinion of the Second Circuit was written by Judge Frank:

"We see no error in the refusal of the judge to hold objectionable the reference of government counsel in his summation

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to the significance of defendant's failure to call as witnesses two bookkeepers (Beekman's daughter and one Friedman). It is sometimes said that no inference can be drawn against a party for failure to call a witness equally available to both parties. And some courts have intimated it is error for counsel to comment on such failure. We agree with Wigmore's criticism of that rule."

Now then, he is quoting the following from Wigmore:

"Yet the more logical view is that the failure to produce is open to an inference against both parties, the particular strength of the inference depending on the circumstances. To prohibit the inference entirely is to reduce to an arbitrary  
2167 rule of uniformity that which really depends on the varying significance of facts which cannot be measured."

That's the end of the quote from Wigmore. Then Judge Frank continues:

"Even if that rule were to be followed, it would not apply where there is likelihood of bias on the part of the person not called as a witness in favor of one party. For then that person is not in true sense equally available to both parties."

Now, Your Honor, in *United States versus Jackson*, that's an opinion in the Third Circuit.

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THE COURT. What were the facts in this other case you told me you were going to tell me about?

MR. LAUGHLIN. The facts in the Beekman case, Your Honor, my recollection is I think it was an income tax case, and there was a question of possibly examination of books by some other witnesses.

THE COURT. And I assume that the daughter was the bookkeeper, --

MR. LAUGHLIN. The bookkeeper, and also--

THE COURT. --the one who kept the defendant's books, and he was testifying something about the books and didn't call his bookkeeper. Isn't that right?

MR. LAUGHLIN. Yes.

2168 Now, In United States versus Jackson, Your Honor, this is  
257 Federal 2d 41, decided in 1958, the opinion by Judge Goodrich. This was an appeal from a conviction on an eight-count indictment charging the defendant, William Jackson, with various violations of the federal narcotic laws.

"We do not need to particularize definitely. The charges cover the usual ones of selling and concealing, in violation of 21 U. S. C." and so on.

"There are two points presented as bases for reversal. The first has to do with a question raised by the jury during the

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course of its deliberation. There was involved in this case an informer named Kennedy who was known to various witnesses and the defendant as 'Sarge.' The foreman of the jury, during its deliberations, asked the court, 'Was the character known as Sarge a government employee?' The judge doubted his power to comment on the evidence as to this matter. We need not decide the correctness of this view, for in any event he also said that he did not remember. The jury therefore was sent back to resume its deliberations without an answer to its question.

"Thereupon a colloquy between counsel and the court  
2169 followed, in which a suggestion was made that those parts of the transcript dealing with the question be read to the jury. After a lengthy discussion, during which government counsel expressed his opposition, the judge finally decided that he would have the portion of the transcript read which we now know showed that Sarge was at the time of the alleged offenses a paid government informer.

"By the time the decision had been reached to let the jury have the information, the body had given notice that it had reached a verdict. In answer to a question from the judge, the foreman declared that they no longer had need of an answer to their earlier question. The verdict of guilty was thereupon returned.

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"The point of the jury's question was highly relevant.

The court had just explained what entrapment was; and on the matter of entrapment the question whether Sarge was a government employee was certainly something to be considered.

"In view of the circumstances present in this case, we think that the failure to permit the reading of the relevant testimony at a time when it would have been useful in the jury's deliberation created unfairness to the defendant."

2170 THE COURT. Wait a minute. Is Mr. Forte asking for an entrapment defense?

MR. LAUGHLIN. No, we are not.

THE COURT. Mr. Garber is counsel for Mr. Forte. Are you asking for an entrapment charge?

MR. GARBER. No, Your Honor.

MR. LAUGHLIN. No; as I understand it, there is no such contention.

"The second question raised has to do with the refusal of the trial judge to allow the defendant's counsel in summation to comment upon the fact that the government did not call Sarge as a witness. He was not so called. Why, the record does not disclose. When counsel started to comment upon the point, the prosecuting attorney objected. The judge concluded that this

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witness was equally accessible to each party, and therefore did not permit the comment. The government does not object to the general rule as quoted from *Graves versus United States*."

That is in the Supreme Court, 150 U. S. 118, quoting:

"The rule, even in criminal cases, is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does  
2171 not do it creates the presumption that the testimony, if produced, would be unfavorable."

That's the end of the quote.

"But it relies upon the often repeated exception to the rule, and supports the district court's decision that this witness was equally available to either side.

"The witness, it is claimed, had been in the courtroom for at least a portion of the trial. And it is said that the defendant, who had admitted knowing Sarge, could easily have found him, had he wanted to do so."

Then it said:

"This argument misses the point. Although the government concedes that the question is not one of mere physical accessibility, the argument made in effect denies the admission. In this case it is pretty clear that the informer, whose connection

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with the alleged sales was testified to by the main government witness, was an important part of the building up of the case in which the defendant's conviction occurred. The chief witness talked about Sarge and how Sarge had helped the discovery of the 2172 law violation of the defendant. His presence was a natural part of the government's case, and certainly he was not the kind of witness that the defendant could be expected to call. We think that clearly his absence was a subject of proper and vigorous comment on the part of defense counsel"--

citing Moray versus United States, 127 Federal 2d 827.

"To deny him the privilege of bringing this very telling point to the jury deprived him of a substantial right. The authorities in the law of evidence are pretty clear on this point."

Now, Your Honor, in McCormick on Evidence, which is referred to, Section 534, McCormick said:

"It is often said that if the witness is equally accessible to both parties, no inference springs from the failure of either to call him. This can hardly be accurate, as the inference is frequently allowed when the witness could easily be called or subpoenaed by either party. What is probably meant is that when so far as appears the witness would be as likely to be favorable to one party as the other, there will be no inference. But even here

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it seems that equality of favor is nearly always debatable, and that though the judge thinks a witness would be as likely to favor  
2173 one party as the other, he should permit either party to argue the inference against the adversary. At least it would appear in this supposed case of equal favor, if the witness' knowledge is directed toward a particular issue. And then the argument should be available against the party who has the burden of persuasion on this point."

Then they are referring, Your Honor, also, quoting from Wigmore, 1st Wigmore Evidence, 288, Third Edition:

"It is commonly said that no inference is allowable where the person in question is equally available to both parties, particularly where he is actually in court, though there seems to be no disposition to accept such a limitation absolutely or to enforce it strictly. Yet the more logical view is that the failure to produce is open to an inference against both parties, the particular strength of the inference against either depending on the circumstances. To prohibit the inference entirely is to reduce to an arbitrary rule of uniformity that which really depends on the varying significance of facts which cannot be so measured.

"However, the term 'available' is not to be construed as meaning merely the accessibility for service of process. The

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2174 determination of the question of equal availability may in a given situation involve the consideration of many factors. Such matters as one party's superior means of knowledge of the existence and identity of the witness, of the testimony that might be expected from him in the light of his previous statements, if any, with reference to the case are to be considered.

"It is a manifest, therefore, that in passing upon this question of equal availability the trial judge is called upon to take into account all of the attendant facts and circumstances bearing upon the situation of the witness with relation to the parties respectively."

And then there were two or three other cases cited.

Now in this case, Your Honor, I am sure Your Honor has had access to the proceedings in the courtroom of Judge Youngdahl, where there was testimony by Dr. Forte that Wallace had approached him, and that Dr. Forte met him at 8th and N, and that Wallace told him that if he would pay \$250 a month for protection, he could operate; and furthermore, that if he paid the sum of \$2,000, the case then pending would be dismissed. Now, that was testimony in the courtroom of Judge Tamm. Wallace took the stand and denied--

THE COURT. You said "Youngdahl."

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2175 MR. LAUGHLIN. Oh yes; excuse me, Your Honor. I want to correct it. That was in the courtroom of Judge Tamm.

Wallace then took the stand and denied it. Then with the jury excluded, the record will show, I made the statement that both couldn't be telling the truth; that it affected the administration of justice; and I made the request that a lie detector test be given both to Dr. Forte and Wallace, to determine who was telling the truth. Forte stood up and was willing to take that test. Wallace refused to take it, and to this day, Your Honor, has refused to take the test.

Therefore, to call Wallace, Wallace would not go against his testimony in the courtroom of Judge Tamm. So therefore I can't see, Your Honor, how it could be contended that Wallace was equally available to us as Wallace was available to the Government. And I contend, on the authority of these cases--and now Your Honor has held that we are not entitled to an instruction--but I think clearly, in the light of these cases, Your Honor, we are entitled to comment on that, in the final argument to the jury.

THE COURT. Mr. Lowther, do you wish to comment on this?

MR. LOWTHER. I do, sir. I ask the Court to adhere to its former ruling. The people who are on trial in this case are Forte and  
2176 Laughlin, the defendants. And Wallace has no part in this case. I ask Your Honor to adhere to your former ruling.

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THE COURT. Mr. Garber, do you have anything to say about this?

MR. GARBER. Yes, Your Honor. To avoid duplicating the prior argument, I join in.

THE COURT. Don't bother duplicating it.

MR. GARBER. No. I join in the statements made by Mr. Laughlin.

THE COURT. Do you want to add anything to it?

MR. GARBER. I think this. The statement was made that Wallace had no part of this case. Of course he is not on trial. It doesn't involve any guilt or innocence on his part, one way or another. But there was testimony in this case concerning Wallace.

THE COURT. By Mr. Forte.

MR. GARBER. By Mr. Forte. And there was also testimony by Mrs. Smith that Mrs. Gross had told her, on--

THE COURT. It goes to Mrs. Gross' credibility.

MR. GARBER. --on several occasions.

THE COURT. She has denied it.

MR. GARBER. And Mrs. Gross has testified that she knew  
2177 Wallace; she knew Wallace during this period. Dr. Forte has testified as to the conversations which he had with Mrs. Gross on the occasions at the Chesapeake Club, and the reasons for the money being

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given to Mrs. Gross. Certainly the jury may wonder more fully about this Wallace situation, as to why he wasn't called. The Government could certainly have called him as a rebuttal witness, as well as Mrs. Gross.

So therefore I feel, along with Mr. Laughlin, that argument along the line proposed would be permissible and would be relevant, in this case.

THE COURT. As I understand the argument made by Mr. Laughlin, and now supported by you, it is that since Mr. Forte brought in the name of Wallace, therefore the Government should go out and attempt to show that Wallace didn't talk to Forte about money, and that you and Mr. Laughlin both agree that if Mr. Wallace would come in he would deny he made any approaches to Mr. Forte about money. Is that the essence of it?

MR. GARBER. In view of his testimony before Judge Tamm, yes.

THE COURT. So therefore the rule is that a witness should be brought in to elucidate the transaction. And the transaction here is whether or not James J. Laughlin and Allan U. Forte obstructed justice, conspired to obstruct justice. The only thing is that you would have Mr. 2178 Wallace come in and testify that he didn't make any approaches to Mr. Forte.

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I am adhering to my ruling. You may not comment on the absence of Mr. Wallace. And if counsel attempt to do so, the Court will interject and advise the jury that Mr. Wallace was as available to the defendants as he was to the Government. That's my ruling, gentlemen.

Now I will hear you on your other proposition, Mr. Laughlin.

MR. LAUGHLIN. Your Honor, I was trying to refresh my recollection. I asked Mr. Garber--

THE COURT. Your complaint was that this Court permitted in evidence the conviction of Mr. Forte in North Carolina on the charge of abortion. And you said that where the charge comes in and says this conviction may be considered with respect to the credibility of Forte-- and, as we all know, the charge goes on and says, "However, it is not evidence of guilt in this case"--you said there should be something put in there that his conviction didn't affect you in any way.

MR. LAUGHLIN. Oh, I see what you mean.

THE COURT. And I said present a requested instruction and I am ready to receive it.

2179 MR. LAUGHLIN. Your Honor, may I confer with Mr. Garber for just a moment? I had overlooked that. Your Honor is correct.

THE COURT. Write it out in longhand, if you don't have it already written.

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MR. LAUGHLIN. Your Honor, I will offer no prayer as to that.

THE COURT. From what I understand, you are not making the point, because I don't have it.

MR. LAUGHLIN. No. I am glad Your Honor reminded me of it.

THE COURT. Now, gentlemen, do you have anything else?

MR. GARBER. Yes, Your Honor. Your Honor indicated that during the course of the Court's charge to the jury that there would be an instruction as to the effect of the prior criminal record.

THE COURT. Yes, sir.

MR. GARBER. And Your Honor read it.

THE COURT. Do you want to hear it again?

MR. GARBER. No. There is nothing wrong with the form of the instruction. I don't object to that. I object to the instruction being given at all, and I base that objection on--

2180 THE COURT. You objected to the evidence being received.

MR. GARBER. Yes.

THE COURT. Once in, it's a proper charge; isn't that right?

MR. GARBER. Yes. But in order to preserve the record, I feel I must make my objection.

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THE COURT. I think you have well preserved the record, so far as the admissibility of the prior conviction. I think that's what your complaint is.

MR. GARBER. Yes. And therefore, to follow it up, I would object to the instruction being given.

THE COURT. All right.

MR. LAUGHLIN. Your Honor, on that instruction, I realize you are going to follow the federal law on that. Is Your Honor also in your instruction going to mention Dr. Forte's explanation of it?

THE COURT. No, sir.

MR. LAUGHLIN. You feel that is a matter for argument?

THE COURT. That's what Mr. Garber can argue. In other words, that is permissible, that he is able to say that Mr. Forte--and remember the evidence is quite limited, however.

MR. LAUGHLIN. Yes, sir.

2181 THE COURT. Mr. Forte didn't testify as I understood Mr. Garber's proffer. Mr. Forte testified that in North Carolina he, in company with two of his counsel, one a naval reservist being called up for duty, went in to the judge's chambers with the judge and the solicitor. And the naval reservist said, "I've got to go off; I've been called back into the service. I suggest you plead nolo contendere, because otherwise," he said, "you're going to do time in the state penitentiary, and

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you want to get out of the state." And Mr. Forte said that he did enter his plea. And also there is the subsequent evidence here of the pardon. And that's the extent of it.

I am going to tell you something. You all remember the rulings I have made, both sides, in connection with the various pieces of evidence received or which I refused to receive in evidence. I expect counsel in their arguments to bear in mind these rulings of the Court. The Court does not ever want to interrupt counsel in argument. But if counsel disregard the rulings of the Court, the Court will stop the argument and advise the jury accordingly. I want you all to bear that in mind, please.

MR. LAUGHLIN. Well, Your Honor, then it will be understood, yes, and I think you have covered it, that all requests and objections previously made are renewed, and your

2182 THE COURT. Yes, and the same rulings are made. Just to make sure, Mr. Laughlin--and I think I understood you correctly--knowing that I am going to give the charge with respect to Mr. Forte, having taken the stand as a witness, that a defendant is competent to testify, and so forth, and his credibility, his criminal record, you do not want the charge that a defendant need not take the stand?

MR. LAUGHLIN. No, I don't want that.

THE COURT. All right. And I will read it so we will know exactly what you do not want.

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MR. LAUGHLIN. Very well.

THE COURT. "The law does not compel a defendant to take the witness stand and testify, and no presumption of guilt may be raised and no inferences of any kind may be drawn from the failure of any defendant to testify."

MR. LAUGHLIN. Yes, sir.

THE COURT. That is not going in.

MR. LAUGHLIN. I do not want that, and make no point of it, Your Honor.

THE COURT. Very well.

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TRANSCRIBED RECORDING OF CONVERSATION  
BETWEEN SULLIVAN AND GROSS AND  
BETWEEN WALLACE AND GROSS

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April 21, 1966

365 MR. LAUGHLIN: He's a member of the Bar.

MR. ROTHBARD: If you'd rather not --

MR. LOWTHER: As I understand, the Judge wanted the  
Courtroom cleared.

MR. LAUGHLIN: Ask him, tell him he's an attorney.

THE DEPUTY CLERK: Who is it; Mr. Rothbard?

MR. LAUGHLIN: See what he says; go talk with him.

MR. ROTHBARD: If it is objectionable, I will leave.

(Mr. Laughlin conferred with the man referred  
to as Mr. Rothbard.)

THE DEPUTY CLERK: The Judge says that only parties in  
the case are to remain in the Courtroom. If you wish to enter your ap-  
pearance for one of the defendants, you may do so and stay.

MR. ROTHBARD: No, indeed; excuse me.

MR. LAUGHLIN: That will hold good, I understand, for --  
O.K.

(The tapes were played further as follows:)

"VOICE: Operator, I want to make a person-to-person  
call to Washington, D.C., please. I want to speak with a  
Sergeant Wallace -- Detective Wallace --

"That's right, and the number is National 8-4000."

MR. LAUGHLIN: I can't hear that.

366 "VOICE: My number is Forest 7-7440 and I'd like to  
charge it, please -- Wallace, Samuel Wallace -- well, he's

Wallace-Gross - Transcribed Recording

on the Homicide Squad.

"VOICE: O.K.

"VOICE: Well, can they give us his home phone number?

"VOICE: Well, this is important. This is a Baltimore call. Baltimore, Maryland."

MR. LAUGHLIN: Is this part of the conversation that we are talking about? I can't hear it.

"VOICE: Well, all right, thank you.

"VOICE: Operator, I have a number here, I think it is the right number. We'll try it anyway, Judson 8 -- JU 8-4619 -- and I'd like that person-to-person, too."

MR. LAUGHLIN: Would you tell the Judge, before we go too far, that we can't hear what's now being played? Would you do that?

THE DEPUTY CLERK: Yes. Which one is this you are playing?

MR. SULLIVAN: Conversation of Wallace and Gross on July 24, 1963.

(The Deputy Clerk left the Courtroom, and returned with the Court, whereupon the following proceedings were had:)

367 MR. LAUGHLIN: The part that was being played, Your Honor, we could not hear. I would suggest maybe if it was put on the table here, it might be better for all of us.

THE COURT: If what was put on the table?

MR. LAUGHLIN: The device there.

THE COURT: Put it anywhere you think it will be more suitable.

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MR. LAUGHLIN: If you listen, I think you will be --

THE COURT: Well, there was another tape in the Gross tape we couldn't hear. I don't know how we can guarantee you can hear them all. All we can do is to do the best we can. If you think it will be better on the table, let's put it on the table, and let everybody sit down and relax.

THE DEPUTY CLERK: Mr. Lowther, will these be used any more this afternoon, these exhibits?

MR. LOWTHER: They will.

THE COURT: Try it. All we can do is the best we can.

Mr. Forte, if you have any difficulty hearing, bring your chair around here.

(The Court returned to chambers, and the following proceedings were had, beginning with the playing of the following taped conversation:)

368 "VOICE: Hello -- hello, how are you?

"VOICE: Fine; you?

"VOICE: Oh, I was O.K. till just a little while ago.

"VOICE: What's wrong? Where are you at?

"VOICE: I am home, still home.

"VOICE: Oh, good.

"VOICE: How is everything going?

"VOICE: Fine.

"VOICE: Listen, I got a call from Sullivan.

"VOICE: Yes?

"VOICE: What is this -- says he heard -- what's this

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about this meeting, he says something he heard to me about a meeting with Laughlin. Did you tell him anything?

"VOICE: I don't know anything about it.

"VOICE: What do you mean, he didn't -- from Acheson.

"VOICE: He is --

"VOICE: He is a friend of who?"

MR. LAUGHLIN: Any way it can be turned up?

"VOICE: Well, I don't even know whether he knew about it.

"VOICE: Well, now, from what I gather, Forte told --

369 "VOICE: Forte, I don't even know -- well, Forte must have known that -- met him, but he didn't know where -- because he tells me everything that I had said to you.

"VOICE: Wasn't what I said because I don't know a thing about it -- and I --

"VOICE: First thing that I heard --

"VOICE: I tell you this cost me \$5 -- he said nobody else -- Dottie, and Dottie's not going to tell --

"VOICE: That's right, but what I say about it, he said he's going to come over and see.

"VOICE: Well, I told Sullivan tonight I didn't know anything about it and he wanted to come over tonight, but he's going to bring you --

"VOICE: Well, I told him not to come because I got a --

Wallace-Gross - Transcribed Recording

"VOICE: Oh.

"VOICE: Not that that means anything, I mean --

"VOICE: But I tell you, I mean it's too much for me --

"VOICE: Really did, that's why I didn't say anything.

"VOICE: I don't see where it had any bearing.

"VOICE: I didn't.

370 "VOICE: I didn't, either

"VOICE: Anyway, Acheson is supposed to have got  
real mad about it, like I told Sullivan --

"VOICE: Who?

"VOICE: Laughlin and Forte; so I asked Sullivan,  
'Well, who told' -- he said -- shall I tell him --

"VOICE: Yes, but I mean, it was Forte going against  
Laughlin.

"VOICE: That is what I heard -- "

DEFENDANT FORTE: I'm sure that sound can be increased.  
Can't you make that a little Louder, Mr. Sullivan?

MR. SULLIVAN: (Shrugging shoulders.)

(The recording was played further as follows:)

"VOICE: I don't know, I just don't know --

"VOICE: And I told -- accident --

"VOICE: I think they asked me --

After I went in for the first time, the Grand Jury,  
then they took me to the office. Well, they asked me in there,  
but I wasn't under oath there, so -- but then, when I had this  
call back to the Grand Jury they never asked me. I -- I didn't

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want to involve --

"VOICE: What did Sullivan say --

"VOICE: He just said something about a meeting  
371 between Laughlin and myself, and I said, 'what meeting?',  
and he said, 'well' --

"VOICE: My father is here, and I don't want to put  
my father through anything --

"VOICE: I called, you know --

"VOICE: Well, I don't know, but --

"VOICE: As far as I know, I don't know anything --

"VOICE: I just thought I was so sure it was you.

"VOICE: What for?

"VOICE: Well, Forte knew, Forte knew because  
Forte called me from his office, said he was going to come  
in with me --

"VOICE: At the store. See, at that time I was work-  
ing full time, two nights a week.

"VOICE: It didn't come from you --

"VOICE: Well, there is a lot that I haven't testified  
to, if you know what I mean --

"VOICE: Well, I am not. I am not.

"VOICE: Yes.

"VOICE: When -- call me first -- 'cause I don't  
have to let him in.

"VOICE: Well, you still working on it.

"VOICE: What do you mean -- there, when I was there --

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I don't know.

"VOICE: I don't know, seems to me that they have  
372 uncovered a hell of a lot of stuff --

"VOICE: As I say, I haven't heard from him in a  
long while because I was on vacation.

"VOICE: Who, Sullivan?

"VOICE: Yes.

"VOICE: Uh-huh.

"VOICE: Well, the only way --

"VOICE: Why in the hell they do that with Jean Smith --

"VOICE: Who's this Duncan?

"VOICE: Duncan --

"VOICE: Don't know why the guy don't --

"VOICE: Why do they keep --

"VOICE: What's he, State's Attorney, or what?

"VOICE: Was he like Sullivan?

"VOICE: Well, he's like Sullivan --

"VOICE: Oh, he's a burn --

"VOICE: -- and he's a friend of Forte.

"VOICE: A friend of Forte.

"VOICE: Well, that's nice.

"VOICE: Well, I wonder, you know --

"VOICE: The whole case from the beginning, how did  
they get him --

"VOICE: I have no idea.

373 "VOICE: That's what bothers me, because I know,

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certainly, that -- unless he was there, and once he was there -- told, but how did they know before?

"VOICE: Did you know I was in on it before?

"VOICE: No.

"VOICE: Well, you knew when I called you --

"VOICE: You called me --

"VOICE: I called you right at the beginning --

Sullivan -- dreamed it up -- don't know -- from a hole in --

"VOICE: Got lot of friends -- right places --

"VOICE: Well, hold on a minute, give me time to get this down, will you --

"VOICE: I didn't even know he had a place down at the Bay.

"VOICE: Well, I didn't know --

"VOICE: Well, I'm going through, and I didn't get nothing out of it but just aggravation.

"VOICE: I wish the hell I did.

"VOICE: I don't, either, because what's the difference? I mean, it isn't as if my life --

"VOICE: Oh, no, I know that, but I mean --

"VOICE: I don't trust 'em, either. I don't trust any of them, none of you -- don't trust --

374

"VOICE: Called the other day.

"VOICE: Called who?

"VOICE: Called --

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"VOICE: For what?

"VOICE: What he call you for the --

"VOICE: Could you help it?

"VOICE: I could try --

"VOICE: You're better keeping your nose out of it --

"VOICE: Well, all right, as long as I know it isn't you, and I hope it isn't, because I would feel awfully bad --

"VOICE: Well, I don't think they are going to check any more. They still checking records?

"VOICE: What did I call you for? I can't tell them. I called you for this.

"VOICE: I called you to fix a ticket --

"VOICE: If he can do it, I can do it, too --

"VOICE: No, I don't know anything about it. I don't want 'em out here -- not now when my father is here.

"VOICE: Well, this is the third week, and probably -- O.K., Sam.

"VOICE: I'll be talking to you.

"VOICE: Right."

375 (Thereupon, the playing of the above tape was concluded, and the following proceedings were had:)

MR. SULLIVAN: This is the start of the second conversation between Mrs. Gross and Wallace on July 24, and it starts right here with this kind of a blurt:

"VOICE: When?

"VOICE: Will call me back?

Wallace-Gross - Transcribed Recording

"VOICE: Wanted to know your number.

"VOICE: -- me the charges, yes, you want the bill.

"VOICE: And she said no, but I will pay the bill.

"VOICE: Oh, no --

"VOICE: Yes, she did. She called me and gave me  
the charges.

"VOICE: But anyway, Sullivan -- he says --

"VOICE: What's that noise? You got this taped?

"VOICE: Well, you hear that noise.

"VOICE: I hear a humming.

"VOICE: A humming, yes.

"VOICE: You want me to call you back?

"VOICE: No; if you say no, I trust you. I'm not saying  
nothing, anyway, so you go ahead, you do the talking.

"VOICE: O.K.

"VOICE: I wasn't, he's a lot of crap -- well, I  
376 wasn't exactly thrilled to hear from him, either.

"VOICE: Yes -- yes.

"VOICE: That's right.

"VOICE: Oh, he did?

"VOICE: That's right.

"VOICE: That's right.

"VOICE: What are they making, a Federal case out  
of it --

"VOICE: I don't know why, so I --

"VOICE: I'm glad you told him that --

Wallace-Gross - Transcribed Recording

"VOICE: Oh, really?

"VOICE: Oh.

"VOICE: Oh, there was -- if I knew you were alone I would have come over and spoken to you -- I am working tomorrow --

"VOICE: Listen, they get anything on you, are they on to you at all? -- You know I got --

"VOICE: Somebody else.

"VOICE: Where on the Police Department -- someone in your squad -- do you know who it is, not Kelly, I knew somebody was -- they all think I got it -- this is before the Hill --

"VOICE: What, a white fellow -- does Sullivan know about -- well, I know when Forte called me he didn't mention  
377 any other name but yours -- why --

"VOICE: Well, no, no, I don't -- the Hill case I didn't even know anything --

"VOICE: I am talking about the other case, about he recalled me and told me about -- that you were doing this, you were doing that, you weren't doing nothing -- why in the hell would he tell me that?

"VOICE: You called me. You called me the first time. Sure you did, he told me -- because I wouldn't do anything without your O.K., and he called me and he says 'You will get a call from him', and I did, one morning. You called me.

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"VOICE: Are you calling him back?

"VOICE: Sullivan?

"VOICE: Yes, -- well, do me a favor, will you. I have played straight with you and do the same thing, have a little respect for my father and do not come to the house?

"VOICE: Taken me in -- to protective custody -- where they going to put me? -- oh, that's all I need -- well, I'm getting a little mad, too, so don't worry -- don't -- don't worry me about he's getting mad. What the hell does he think I am? I am sitting here on a keg of dynamite -- oh, I'm safe here -- what, you kidding? I wouldn't --

378 "VOICE: Oh, I don't know, 2:00 o'clock in the morning --

"VOICE: Are you nuts?

"VOICE: Are you calling Sullivan that? Are you supposed to have called me --

"VOICE: He's going to call you. You supposed to call me. All right, you tell him you spoke to me and just say the girl said that she was leveled with you straight along. Do her this little favor, wait until my father goes back. I mean, hell, it's not that long, and it's nothing that's burning.

"VOICE: Well, then, you don't want to work when you're off, anyway --

"VOICE: Oh, my -- that is not right.

"VOICE: No, I know it's not right, so that's why

Wallace-Gross - Transcribed Recording

I said we'll --

"VOICE: Yes, well --

"VOICE: Will you ask him to do me a favor -- then I have a clear mind and I don't have to worry, you know, my father sorries when I go in."

MR. SULLIVAN: That concludes the second conversation on that day.

MR. LOWTHER: Does that conclude the conversation  
379 between Bernice Gross and Sergeant Wallace?

MR. SULLIVAN: Yes, sir.

MR. LOWTHER: Very well; that concludes Government's 14 for identification, and next in point of time, since the other tape has been offered in evidence, I am going to offer that part of Government's 13, conversation of -- I say offer; I am going to offer to play the March 18 conversation between yourself and the witness Gross.

MR. SULLIVAN: Just before you do, if I could borrow a piece of Scotch tape, a small segment of tape about an inch, three-quarter of an inch long, -- spun off the reel here. I will tape it to the reel.

MR. LOWTHER: Suppose you put it in the envelope with the -- wait a minute. I don't think there is any Scotch tape up here.

MR. SULLIVAN: The piece that spun off, I will just tape to the box of the tape.

DEFENDANT FORTE: Doesn't that machine have more volume than you gave us?

(Mr. Garber conferred with defendant Forte.)

Sullivan-Gross - Transcribed Recording

MR. LOWTHER: May I have No. 13, please?

This is that part of Government's 13 already -- part of it is already in evidence -- reflecting the call of March 18 between the witness Gross and Mr. Sullivan.

380 MR. SULLIVAN: That's correct. I don't know where this begins on this reel of tape. I believe it's right near the very beginning. I'll have to listen on the earphones to see.

(The tape referred to was played as follows:)

"VOICE: Good morning, did I wake you up? Sorry.

When Mrs. Gross told me you would be up about 9:30 or 10:00, I thought that sounded like a pretty good deal to me.

"VOICE: Oh, boy.

"VOICE: Well, I am going in to the Grand Jury at 9:30. That's why I wanted to call you.

"VOICE: We got a problem for the foreman of the Grand Jury tomorrow and it looks like now from the telephone call we won't be able to get one. That's why I was calling Wednesday. Is it specially bad?

"VOICE: Well, here's the question: Would Wednesday be worse than trying to make it for this afternoon, and in my -- hundred percent -- come over, but I'd like to do three things. One is the testimony of the jury, and second thing is I'd like you to listen to a tape.

"VOICE: Mr. Laughlin, -- and then after you have heard that, I'd like to ask you to make one more phone call and see -- good idea --

Sullivan-Gross - Transcribed Recording

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"VOICE: Uh-huh.

"VOICE: Uh-huh.

"VOICE: O.K.

"VOICE: In the Grand Jury.

"VOICE: Absolutely, because the most -- thing we want to get, well actually -- wrap it up, put it in your pocket-book.

"VOICE: Nothing.

"VOICE: No; as a matter of fact, I think --

"VOICE: Yes. Oh, no, absolutely not, she was very definite that you were a hundred percent --

"VOICE: It's a shame too, because, gee, she could really help herself by --

"VOICE: Well, --

"VOICE: Well, she's in a little different position than your position, to make --

"VOICE: So, --

"VOICE: Well, let me see; what's the best time as far as you are concerned?

"VOICE: First thing this afternoon would be better over here for us. If you can get here earlier, be all right with us.

"VOICE: Uh-huh.

"VOICE: Well, I am going to be in the Grand Jury --

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"VOICE: I -- I don't know what they want from me --

"VOICE: Yes.

Sullivan-Gross - Transcribed Recording

"VOICE: O.K. Pick you up at 12:00.

"VOICE: Yes.

"VOICE: And how do we get to your house?

"VOICE: I don't even know the address.

"VOICE: 27.

"VOICE: 27.

"VOICE: 15.

"VOICE: 15.

"VOICE: And --

"VOICE: And you get over to Beltway.

"VOICE: Is that the Washington Parkway, you mean?

"VOICE: No, we take --

"VOICE: O.K., Beltway West.

"VOICE: To Greenspring Avenue exit, O.K.

"VOICE: All right."

MR. SULLIVAN: If I could turn that off just a moment, gentlemen, the verdict in the other case -- be back in a few moments.

(Thereupon, at 3:10 p.m., Mr. Sullivan went to another Court to receive a verdict in another case, returning at 3:25 p.m. the same day, whereupon the following proceedings were had:)

383       LAW CLERK: Mr. Laughlin, I asked the Judge, as you suggested. It would be all right for Dr. Forte to leave for the rest of the afternoon, and he said, fine, but he just wanted me to make sure that you both understood the tapes would not be played again.

MR. LAUGHLIN: Oh, I see. We understand. Well, of

Sullivan-Gross - Transcribed Recording

course, -- yes, we understand that, but we are going to ask that they be stepped up because I think, as to one or two of them, the reporter wasn't getting all of it. Of course, that is a different story.

LAW CLERK: That is something I don't think that is what he was talking about. What he meant was you can leave any time you want, but they are going to be played today.

MR. LAUGHLIN: Yes; all right.

(The playing of the tapes was resumed as follows:)

"VOICE: O.K.

"VOICE: O.K.;let me --

"VOICE: Good enough, Parkway to Beltway to Towson turnoff, and you go on the Beltway then to --

"VOICE: Beltway --

"VOICE: O.K., Beltway -- and you stay on the Beltway to Greenspring Avenue exit, get off there and take Route 3 south, go straight on that to Pimlico and -- which is one  
384 block past the light in Pimlico and --

"VOICE: You come off. Wallace is off today, but it will be either Wallace or Preston -- guess all of those you met the other day, with the exception of --

"VOICE: I don't know, actually, they might have a little -- hard to say, but they might have --

"VOICE: Oh, yes.

"VOICE: Uh-huh, O.K.

"VOICE: Yes.

Sullivan-Gross - Transcribed Recording

"VOICE: How about that. Well, we'll make sure we'll have them -- O.K., good, O.K.

"VOICE: Well, fine, that is Mrs. Gross.

"VOICE: Right; goodbye."

MR. LOWTHER: That completes the call of March the 18th, which appears on Government Exhibit 13 in evidence; is that right?

MR. SULLIVAN: That's right.

MR. LOWTHER: Very well. Will you rewind it, please.

(The tape was rewound.)

MR. LOWTHER: Now, then, will you please, handing you Government Exhibit No. 15 for identification, and it's a call of March 6th, according to my notes, between the witness Gross and yourself,  
385 which I think you will have to use earphones --

MR. SULLIVAN: We have reached the point on the tape where that conversation begins, sir.

MR. LOWTHER: Very well.

(The tape was played as follows:)

"VOICE: Hello.

"VOICE: Hello.

"VOICE: Hello. Is Mrs. Gross there, please -- oh, Mr. Gross, yes, sir, my name is Sullivan, sir, over in Washington, D.C.

"Yes, sir. Is Mrs. Gross at home, please, and if so, may I speak to her?

"VOICE: Yes; hello.

"VOICE: Oh, hello, Mrs. Gross.

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"VOICE: I've got a date.

"VOICE: O.K., fine. Just wanted to chat with you for just a quick moment. First of all, thank you very much for not tipping our hand about the fact that you told the truth over here.

"VOICE: No; well, it's been obvious today that you haven't, so thank you -- well, can't say exactly what happened because it happened in the Grand Jury. Things are moving along pretty well.

386 "VOICE: Well, did they indict them?

"VOICE: Oh, no, no, because we are just at the beginning of this, but I expect that there's at least a possibility that Laughlin might call you tonight.

"VOICE: Well, I'm leaving now.

"VOICE: Are you?

"VOICE: I am. I am leaving the house.

"VOICE: Well, he may possibly call because he's before the Grand Jury today.

"VOICE: He was?

"VOICE: And he doesn't know any Bernice Gross -- somebody at my door, just a second.

"All right. So shouldn't have done --

"VOICE: Yes. Well, my telling him, he didn't say anything.

"VOICE: Yes, sure.

"VOICE: I didn't say anything at all -- actually, between

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the two of us, I think he can really see this because I never did, you know, have contact, personal contact with him.

"VOICE: Well, you are right about that, of course.

"VOICE: And you know how an attorney is supposed to right for his client. You know that.

"VOICE: Sure enough, but not that he is supposed to  
387 do anything crooked.

"VOICE: Well, I think he was -- I don't know --

"VOICE: I know; you refer to Forte as the old man.  
I almost called him the old man in the Grand Jury today. I think Laughlin would have known who we were talking about.

"VOICE: Yes, because I say I never mentioned his name.

"VOICE: Yes.

"VOICE: How is Wallace taking all this?

"VOICE: Well, I guess Wallace is taking it pretty good, but you know it's a pretty tough thing in his -- I don't know, you know, he knows he didn't do anything wrong.

"VOICE: Well, I hope he didn't.

"VOICE: Yes.

"VOICE: I hope he didn't, truthfully.

"VOICE: Yes. Well, --

"VOICE: I mean, I don't know, see, I don't know anything about that, but I just hope he didn't, for his own good, because -- so upset that he will blab whatever he does know, if he knows anything about Wallace, I don't know.

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"VOICE: Well, of course, -- think there is anything  
388 that could normally hurt Wallace because Wallace, he is  
just straight, that's all there is to it.

"VOICE: Well, I hope he is -- really I do.

"VOICE: Just like, does this -- make it instead of  
break it.

"VOICE: What thing?

"VOICE: You know, the accusations made against  
Wallace during the trial.

"VOICE: Well, that is --

"VOICE: Well, that is just the thing of it. He's foolish.  
I don't know how anybody can think they can make up a story  
like that and get away.

"VOICE: What happened, now? It all reverts right  
back to him.

"VOICE: Well, true enough.

"VOICE: But anyway, my husband knows all about it.

"VOICE: Well, that's good. I assume he does.

"VOICE: And -- that is why I called him right now --  
because if he calls me or lawyers call --

"VOICE: Uh-huh. Well, he really shouldn't, and if  
you want me to just say a word to your husband about it if  
he didn't tip our hand it would be a great service to justice.

"VOICE: Well, I said he would.

389 "VOICE: Uh-huh, yeah.

"VOICE: Salesman on the road.

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"VOICE: Oh, is he?

"VOICE: Uh-huh, and I mean he's, -- he just felt pretty bad when he first heard about this. He was so upset.

"VOICE: Sure.

"VOICE: But -- it was -- you know.

"VOICE: Oh.

"VOICE: Hum-m?

"VOICE: Well, and just -- anxious to find out -- well, what we were talking about before, you know Forte says to you and you're mad about him pointing a finger at -- and that thing. He says when my lawyer put me up to it, something like that. Well, heck, if there was only some way of finding out what the heck or how the heck they constructed that story.

"VOICE: Why did he construct it?

"VOICE: Why did he construct it? He constructed it to camouflage and make a smokescreen.

"VOICE: That's what I mean. Why did he do that? Why?

"VOICE: Well, --

"VOICE: Why did he get up and say me?

390 "VOICE: Well, just as he is, let's say, I suppose --

"VOICE: I mean, why didn't he get up and say -- why did he say me, that I came to him -- said that.

"VOICE: Wallace here -- the logical target, if you're going to lie, might as well lie about the man put you under arrest.

"VOICE: I don't believe his lawyer put him up to it.

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I really don't. What's he going to tell me, he had to tell me in --

"VOICE: That's true.

"VOICE: But I tell you, I don't want to talk to them, you know --

"VOICE: No.

"VOICE: What happened now today; in other words, the lawyer went before the Grand Jury, says he knows that I --

"VOICE: No, he does not know that you told the truth.

"VOICE: That's what I want --

"VOICE: No, that is all under the carpet. He definitely doesn't know.

"VOICE: Well, here's what happened. Laughlin volunteered to come down here, said he'd like to go before the Grand Jury, and I thought, well, one of two things. I tried to call you today, couldn't get you. In the event that you decided to go back on the  
391 bad time, which I didn't think could happen --

"VOICE: I didn't think so.

"VOICE: Well, what really bothers me -- what really bothered me, Laughlin was going to set up something going in, say, look, you know, I do know Bernice Gross and she called me the other day, and I tried to go along with her because I thought she was going to set me up, and set me up, that is what I thought he was going to do because, you know, he is ruthless; but he said, you know, 'I don't know Sergeant -- and don't know Bernice Gross, and so -- never talked to

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her, never talked to her in my life. '

"VOICE: I can't understand; why did he volunteer to come down?

"VOICE: Well, he volunteered to come down because he wanted to get Forte in the Grand Jury to repeat the story that he told on the stand about Wallace, if they would promise not to ask Forte any other questions.

"Well, I said I can't promise, but I can tell you this, if he wants to tell half the story it's O.K. from the Grand Jury. I don't care what he tells if they want to hear from him. So Forte came down and outside the Grand Jury Laughlin and I agreed that Forte could come in and just  
392 make a statement on the alleged shakedown by Wallace, so I assumed he was trying to camouflage to the Grand Jury. I didn't -- I did say this to him so he would think that I was trying to bluff him: I said 'If I told you Jean Smith testified that Bernice Gross and Jean Smith and you met this week in the National Press Building, what would you say about that?', and he said, 'Oh, that is a terrible lie.' So he assumed then that I was bluffing, and then he went on and just asked the --

"VOICE: But -- and I expect -- that you are O.K. now.

"VOICE: I hope so.

"VOICE: Certain -- questions, but I also bore down on Lorraine and I said you know -- if I told you that Bernice said that Lorraine -- knew Bernice Gross, and so on and so on, I attempted to -- questions, looks to him like you have been perfectly straight with him.

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"VOICE: I doubt whether he will call me.

"VOICE: Well, you know that might make him not call, and it might make him call and offer you a nice tidy sum, I don't know.

"VOICE: Are you kidding -- it's all the way around.

393

"VOICE: Uh-hum.

"VOICE: Poor girl, poor feet all blistered up --

"VOICE: Had her walking --

"VOICE: (Laughing).

"VOICE: (Laughing) -- when a person be on the road, you know -- we're going to eat, I'm going to eat lobster -- 7:00 o'clock, could hardly get out of the car -- and I was tired and hungry, and I started to laugh and couldn't stop. I -- you know, it was just a whole day, you know, my head was -- you know the whole thing is this, I just didn't want to be a rat, that is the whole thing.

"VOICE: Yes, but telling the truth, you said you felt better.

"VOICE: I felt better telling the truth than I would have --

"VOICE: Well, -- yes, you're very practical about that. I tell you, as you said, well, the one that was sitting as foreman that day, he got some kind of habit there. He wants cooperation, there's no doubt about it.

"VOICE: When you start a case, you certainly -- want to go the whole way, I can understand.

Sullivan-Gross - Transcribed Recording

"VOICE: He constantly said 'Look, I want to get all  
394 the facts. I don't want anything hidden,' --

"VOICE: He's right, but what are you going to do  
when he gets -- starts --

"VOICE: That is good to have someone like him.

"VOICE: I was thinking what they would think of me --

"VOICE: Yes.

"VOICE: Because, believe me, six years on the Depart-  
ment -- would never, never, never real to anybody --

"VOICE: I got a call from Sergeant -- here come the  
cleaning people -- they are coming down.

"VOICE: Are you still there?

"VOICE: Yes. Well, I've got something else.

"VOICE: No wonder you're a bachelor.

"VOICE: See that? I couldn't be a married man, no  
but Sergeant -- called over and she said 'Look, are you  
finished' -- said 'I have this man that is' --

"Did she talk to you at all?

"VOICE: Yes.

"VOICE: Does she --

"VOICE: You know? Lorraine -- Lorraine never called  
me to see -- you know -- wants to stay out of it completely --  
but Sergeant -- and I were very close for six years, you know.

395 "VOICE: M-m-hmm.

"VOICE: She know -- the story?

"VOICE: She knows the -- but she doesn't know --

Sullivan-Gross - Transcribed Recording

"VOICE: Well, she's -- she has to be -- she must be -- or else Laughlin and Forte would have to know that the truth was out.

"VOICE: Because I told -- at the Club don't -- anybody, you never know who. I called him up and said -- he will fall for it. So I said don't say anything --

"VOICE: Well, I am delighted to hear that because I didn't know when she called. I said, 'Look, I understand that Bernice Gross may have to come back -- thought to myself maybe she heard that Laughlin or Forte -- and if she talked to you, she talked to them -- that is good.'

"VOICE: She has no love for -- doesn't even know the lawyer --

"VOICE: Sure.

"VOICE: But -- you know, as far as --

"VOICE: Sure; well, good.

"VOICE: I am glad that they don't know --

"VOICE: What's that?

396 "VOICE: You can't use that recording in court, can you?

"VOICE: Oh, sure.

"VOICE: I thought, you know, that anything like that, it's not admissible.

"VOICE: Oh, no, no, only thing that's not admissible would be a wire tap where you would sneak into the conversation and --

Sullivan-Gross - Transcribed Recording

"VOICE: Because I remembered -- and we listened in to a -- and testified --

"VOICE: Uh-huh.

"VOICE: And -- and they let him out.

"VOICE: Well, -- recited a conversation what was going on --

"VOICE: Why did you listen in? How come Wallace listened in?

"VOICE: Well, I didn't want to listen in on it because I didn't want to be a witness to the other half of the conversation, because if I am trying the case it is a little awkward to be a witness.

"VOICE: You know, so that is the difference when you said it was O.K. and you go ahead and call, and you say -- well, you knew somebody was listening, that is the whole part of it.

397 "VOICE: Anyone who talked on the phone has to take a chance to get it in court -- have a detective run across the street --

"VOICE: But we were lucky that night.

"VOICE: Right now I just don't know, it may not be necessary.

"VOICE: May very well not be. The transcript, you know, your statement the other day, been read to the Grand Jury probably tomorrow, five more pages to type today.

"VOICE: I don't think that it will leave many things

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unsaid. I think it's pretty much the whole story.

"VOICE: That may save you a trip back.

"VOICE: Can't blame him, it's a long wait for --  
that day.

"VOICE: O.K.; thanks, Mrs. Gross, very much.

"VOICE: -- will you --

"VOICE: O.K. Good night."

MR. LOWTHER: That completes Government's Exhibit --  
that part of Government Exhibit for identification 15; is that correct?

Rewind it, please.

(The tape was rewound.)

398 MR. LOWTHER: Now, I am handing you Government's 16  
for identification, according to my notations, March the 12th, and  
there are two calls between the witness Gross and your self.

(The recording was played as follows:)

"VOICE: Operator, could you please place a long distance  
person-to-person call for me. This is Sullivan in the D.A.'s  
office. I am calling Bernice Gross, (spelling).

"VOICE: Oh, yes, she just said that --

"VOICE: I am calling (phone number unintelligible).

"VOICE: Thank you very much.

"VOICE: You're welcome.

"VOICE: It's O.K. Well, I'll check.

"VOICE: Mrs. Gross.

"VOICE: Thank you, Mrs. Gross.

"VOICE: Go ahead.

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"VOICE: Mrs. Gross.

"VOICE: Go ahead.

"VOICE: I am sorry to be so hard to get today.

"VOICE: That's all right, I'm not home. I am visiting a girl friend today. That is why I --

"VOICE: Look, I just got a call from Mr. Laughlin -- said it was very, very urgent that I contact him immediately, so before I called him, I wanted to talk to talk to you first,  
399 see if he'd called you or --

"VOICE: No, uh-uh, no, uh-uh.

"VOICE: I haven't heard from anybody but you.

"VOICE: Good enough. I've got some people outside here at the door, just want to talk softer.

"VOICE: If he knows anything, this -- why, I keep thinking there's somebody there that's giving him information. I am sure of it.

"VOICE: Yes.

"VOICE: I'm sure of it.

"VOICE: Do you know -- well, let me ask you: Do you know that Sergeant -- was over to see -- last night.

"VOICE: No.

"VOICE: All right, would you do me a favor. Let's keep that between you and me for now.

"VOICE: Sure.

"VOICE: I ask you, maybe I shouldn't, but she came over. She wanted to talk to me. She talked for about, I guess

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about an hour.

"VOICE: She came to Washington?

"VOICE: Yes, she came to see me here in my office last night.

"VOICE: She said everything good about you and -- about what was going on.

400 "VOICE: But, I don't know, she, by no means, did she try to put you in the soup in any way?

"VOICE: Well, I don't see, you know, how she can.

"VOICE: No, no, but I mean, she tried to find out exactly what you said to me, and I just kept putting it back -- to hold her.

"VOICE: She should have leveled with you because I told you whatever happened.

"VOICE: She seemed real nice.

"VOICE: What's her purpose in coming over?

"VOICE: Beats the heck out of me.

"VOICE: That's what I -- no, no, I can't understand.

"VOICE: Well, let's just play that one kind of cozy for now.

"VOICE: Oh, boy.

"VOICE: I've got two people waiting outside my door now -- I'll scoot back to them, but let's -- as far as tomorrow goes.

"VOICE: Yes.

"VOICE: Is tomorrow O.K. for you?

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"VOICE: That is why I wanted to call you. I have to cancel my dental appointment.

"VOICE: What time is that?

401 "VOICE: 10:00 o'clock.

"VOICE: Uh-huh; we could do it in the afternoon.

"VOICE: Well, they got a call in Washington to probably go over with him, so it doesn't matter.

"VOICE: Oh, heck. Well, -- can send a cruiser over, if you want.

"VOICE: What, for me?

"VOICE: Yes; how about that class?

"VOICE: (Laughing). Oh, that would be all right.

"VOICE: Well, whichever way you prefer to do it.

"VOICE: Because I could cancel the appointment, I mean 10:00 o'clock.

"VOICE: Well, whichever way -- if you want to do it yourself, is O.K. by me.

"VOICE: Why don't you call me, let me know about Laughlin?

"VOICE: O.K., will do.

"VOICE: And then I'll --

"VOICE: What time -- call you -- your girl friend.

"VOICE: What time -- going -- call me.

"VOICE: Call me back here, Wilkins 7 --

"VOICE: Wilkins 7-1904.

VOICE: O.K., will do.

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"VOICE: And I'll be here.

402

"VOICE: O.K.

"VOICE: I'll be here until about 3:00, 3:30.

"VOICE: Good enough.

"VOICE: O.K.

"VOICE: Goodbye.

"VOICE: Goodbye.

MR. LOWTHER: That completes the first call on the tape numbered -- for identification -- Government Exhibit 16; is that right?

MR. SULLIVAN: That's correct.

MR. LOWTHER: All right. Will you play the second one, please?

(The Court entered the Courtroom, and the following proceedings were had:)

THE COURT: How many more of these?

MR. LOWTHER: Oh, I'm sorry, Your Honor. I didn't know you were in here.

MR. SULLIVAN: There is one more --

MR. LOWTHER: There are these -- I can answer Your Honor's question. This will be the second call of March the 12th. There then remain No. 17 for identification, two calls on July 2, No. 17 again has a call of July 3rd; No. 18 has July 8 call, and I think several others, and the final one, No. 19, has a September, either 3rd or 30th, call, I can't see which.

403

MR. SULLIVAN: 30th.

MR. LOWTHER: 30th.

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THE COURT: How long do you think those will take? I just want to know whether to tell my wife I will be home for dinner or not.

MR. SULLIVAN: Yes, Your Honor. Your Honor, I think we probably have over an hour and a quarter, or so, to go. I haven't reviewed some of the tapes, and I don't know how long it will take to spot them on the reels.

THE COURT: All right.

(The Court returned to chambers, and the following proceedings were had:)

(The playing of the tapes was resumed, as follows:)

"VOICE: Hello.

"VOICE: Hello.

"VOICE: Hi; how are you?

"VOICE: Yes.

"VOICE: Yes.

"VOICE: Here's what he wants to know.

"VOICE: He wants to know -- and the -- and he said, look, if there is an indictment on the Hill abortion, he thought maybe you could be surrendered. I thought maybe  
404 looking for him on that recent abortion case, so he said, no, not that I know of. So he's just kind of fishing, I guess.

"VOICE: Well, you know -- anything you know about me --

"VOICE: I don't think so--

"VOICE: Because I mean just --

"VOICE: Good enough.

Sullivan-Gross - Transcribed Recording

"VOICE: Yes.

"VOICE: -- such a crumb, what's he doing there?

"VOICE: Oh, yes, he wanted the pictures, too --

"VOICE: Isn't that something?

"VOICE: But she didn't say anything to you about it?

"VOICE: Might --

"VOICE: Last week I believe, you know -- right after  
I was -- after that, then.

"VOICE: Uh-huh.

"VOICE: -- New York for the weekend, last weekend --

"VOICE: I'll be darned.

"VOICE: She wasn't asking -- had anything on you.

"VOICE: If you had anything on me.

"VOICE: No, she wasn't asking that.

"VOICE: Oh.

405 "VOICE: And Laughlin.

"VOICE: And Laughlin.

"VOICE: M-m-hmm.

"VOICE: But she doesn't even know --

"VOICE: She was asking --

"VOICE: Well, don't tell her nothing.

"VOICE: I didn't, believe me I didn't -- you know.

"VOICE: Right; she probably all right, but you know  
just kind of --

"VOICE: How about tomorrow, what's the best --  
for you?

Sullivan-Gross - Transcribed Recording

"VOICE: Going to have to identify those two tapes to the Grand Jury and say that you made them -- and will it be another -- like last time --

"VOICE: Six hours?

"VOICE: No, shouldn't be.

"VOICE: (Laughing.)

"VOICE: I don't think I'd -- should be more -- time than two hours -- we are going to try to put Mrs. Hill on, and if she comes, I'm going to try to put her in quickly because she's pretty sick.

"VOICE: She out of the hospital?

"VOICE: Yes.

"VOICE: Oh.

406 "VOICE: She -- statement doesn't sound too cooperative -- so like to keep it a little flexible so that if I have to use an hour for her I can use it, get her out of here fast.

"VOICE: Uh-huh.

"VOICE: -- pick me up.

"VOICE: Good enough.

"VOICE: So let me do that, and I will --

"VOICE: Oh, boy, O.K.

"VOICE: All right.

"VOICE: All right, -- so --

"VOICE: See, I could be there about 9:30.

"VOICE: About 9:30?

"VOICE: Uh-huh.

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"VOICE: Okey-doke, just in case, we'll wait a second now, because Brother Laughlin will be coming down here tomorrow.

"VOICE: No, I don't want to see him.

"VOICE: No; I want to find out what time he will be coming because no sense -- into him.

"VOICE: No, sir.

"VOICE: How about when you come -- Municipal Court -- let's do that; do you know -- in the D.A.'s Office over there in Municipal Court?

407 "VOICE: Is that in the same building?

"VOICE: No; about two blocks away.

"VOICE: Municipal Court?

"VOICE: Yes, it's 5th and E Street, Northwest.

"VOICE: 5th and what?

"VOICE: E, Northwest.

"VOICE: 5th and E.

"VOICE: Well, I'll tell you what we can do. Let's do this: Suppose -- town, just give me a call here just on the phone, and we can just meet and take you over to Municipal Court, set you in a room -- so that we won't bump into Laughlin.

"VOICE: O.K. --

"VOICE: So I'll just wait for your call, then.

"VOICE: When I get in, I'll call you.

"VOICE: O.K. Thanks, Mrs. Gross.

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"VOICE: O.K. --

"VOICE: Thank you; goodbye."

MR. LOWTHER: That completes the second call on March 12, 1963, Government's 16 for identification; is that right?

MR. SULLIVAN: That's right.

(The tape was rewound, and the following proceedings were had:)

MR. LOWTHER: Giving you Government's 17 for identification, according to my notes there are two calls between the witness  
408 Bernice Gross and yourself, and the date of the calls was July 2, 1963.

(Another recorded conversation was played, as follows:)

"VOICE: Mr. Sullivan, please, I have Miss Gross on the line.

"VOICE: Thank you.

"VOICE: One moment, please.

"VOICE: Mrs. Gross?

"VOICE: Yes.

"VOICE: Yes, indeedy, just about five minutes ago the Grand Jury returned a flock of -- Hello, still there?

"VOICE: Yes.

"VOICE: Grand Jury returned a group of indictments, Laughlin, Forte, a policeman's wife over here in Washington.

"VOICE: Me?

"VOICE: No; a policeman's wife over here in Washington.

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"VOICE: Me?

"VOICE: No, no; and another abortionist over here have all been indicted.

409 "VOICE: Uh-huh.

"VOICE: Basic allegation against Laughlin is one that he lied to the Grand Jury. He swore up and down that he didn't know you, that he never talked to you on the phone about the case or about anything.

"VOICE: Uh-huh.

"VOICE: Telephone Company records, of course, indicate to the contrary, and you know the rest of the evidence.

"Secondly, he's charged with conspiring with Forte and you to get -- and you to get Smith to -- somebody at my door; hold it just a moment, please.

"VOICE: I'm over at the swimming pool. I can't hear you too well. Could you call me at home tonight?

"VOICE: Yes, but let me just give you the picture on this, first, that Forte and Laughlin conspired and got you in on it to approach Smith to get her to do the various things that you testified about, so Forte and Laughlin are indicated in that in a conspiracy count, and also in some separate substantive counts of trying to get Smith and Birge to lie.

"VOICE: Uh-huh.

"VOICE: On top of that, then, Forte indicted in a different abortion over here, the Hill case.

410 "VOICE: Yes.

Sullivan-Gross - Transcribed Recording

"VOICE: And the policeman's wife is indicted for trying to bribe the abortion victim in the Hill case, so that is the picture. I assume that from the way the press is hanging around outside, that probably they already are interested in asking some questions, so that's what --

"VOICE: Well, -- there --

"VOICE: No.

"VOICE: Oh, I hope it stays in Washington.

"VOICE: Yes.

"VOICE: When do you think it will come to trial?

"VOICE: Gosh, I don't know; several months.

"VOICE: That is what I was worried. You know that it would interrupt my vacation.

"VOICE: No, there won't be any interruption of the vacation.

"VOICE: Well, does it look bad for me?

"VOICE: No, you weren't indicted.

"VOICE: Oh, good.

"VOICE: No, no, no.

"VOICE: Well, now, my headache is going away.

"VOICE: Glad your headache is going away. We appreciate your cooperation as an officer, and I know the Grand Jury do -- they did.

411 "VOICE: -- not doing anything -- tonight -- call me at home.

"VOICE: Well, I'll call you --

Sullivan-Gross - Transcribed Recording

"VOICE: Good --

"VOICE: I know I will be working down here late at the office, and there are some matters -- in the case, and if you like me to call you . . . "

MR. LOWTHER: That completes the call of July 2, 1963, appearing on Government 17?

MR. SULLIVAN: It does.

(Another recording of a phone call was played, as follows:)

"VOICE: Hello.

"VOICE: Mrs. Gross?

"VOICE: Yes.

"VOICE: Just a moment, from Washington, D. C.

"VOICE: O.K.

"VOICE: Hi.

"VOICE: Hi; how are you?

"VOICE: All right. I'm over at Dottie's.

"VOICE: Are you?

"VOICE: Yes.

"VOICE: Fine; I was hoping it would be --

"VOICE: -- been running on the phone constantly  
412 since last time I chatted with you briefly.

"VOICE: Well, you know, everybody was making noises.

"VOICE: You were at the swimming pool, you said?

"VOICE: Yes.

"VOICE: How about that --

Sullivan-Gross - Transcribed Recording

VOICE: Okey-doke; so there were five indictments today?

"VOICE: Yes.

"VOICE: One of them was an indictment against the abortionist by the name of -- who had some connection over in Maryland, but I don't think they were operated there -- large extent --

"VOICE: Never heard of him.

"VOICE: He had been in the District, nearby Maryland perhaps, Virginia.

"VOICE: What did he have to do with it?

"VOICE: On the face of it, he has nothing to do with it, and, as far as any connection with the Smith case, there is no connection.

"VOICE: Oh.

"VOICE: But he's indicted on one abortion, you know -- case abortion, and attempt and everything else has to do with Forte. One indictment is against Forte for the abortion on the Hill girl.

413

"VOICE: Yes.

"VOICE: Charged both ways, abortion and attempt.

"VOICE: Uh-huh.

"VOICE: And then a policeman's wife over here.

"VOICE: That I remember.

"VOICE: Yes, Joyce Johnson.

"VOICE: Well, I remember --

Sullivan-Gross - Transcribed Recording

"VOICE: That's right; she's a colored girl.

"VOICE: -- she's charged with offering a bribe to an abortion victim in that case, indictment doesn't say how much, or anything like that, but that she did offer a bribe to her.

"VOICE: But she denied it.

"VOICE: Yes.

"VOICE: Yes, I remember that.

"VOICE: Yes, that's right, she did.

"Let me see. The next one was the indictment for Laughlin.

"VOICE: Uh-huh.

"VOICE: For perjury.

"VOICE: It's kind of long, but charges Laughlin with lying before the Grand Jury. He came in about a week or so after you did.

"VOICE: M-m-hmm.

414 "VOICE: And one of the things the indictment mentioned is that when he came in he said, 'Question: Do you know Bernice Gross? Answer: No.'

" 'Did you ever talk to her on the telephone at all for any reason? Answer: No, never in the world.'

" 'Do you know who she is? Answer: Yes, she is the policewoman retired from the Force in Baltimore whom I mentioned on voir dire.'

" 'Well, you know who we are talking about, then?

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Answer: Yes.'

" 'And you are sure you never talked to her on the telephone? '.

"That is the line of questioning?

"VOICE: Uh-huh.

"VOICE: Absolutely not, never did.

"VOICE: Mm-hmm.

"VOICE: So he was indicted on that, on a perjury count. The Grand Jury on that one section alone said that, whereas he said he didn't, he in fact did, and, well, you know how we subpoenaed the Telephone Company records and person-to-person and collect, and all, -- discuss that, we haven't, with the press as to what our evidence is, but I think any intelligent person is going to figure that is what it is, you know, telephone evidence.

415 "VOICE: Listen, has it gotten on the radio, anything?

"VOICE: Best of my knowledge, no. I think it hit 11:00 o'clock news over here -- kind of late -- press, actually took them a long time to read the indictments and ask questions, so I don't think it would be on spot news, it would be on 11:00 o'clock news tonight.

"VOICE: No newspapers, other than Washington papers, print one's -- no one at all has contacted us for a statement.

"VOICE: Uh-huh.

"VOICE: All statements have to be cleared presumably through me, so I should know if anybody calls, but the

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three papers came in and they asked a lot of questions and you were identified.

"VOICE: I was?

"VOICE: And you were identified as being a former member of the Baltimore Police Force. No question was asked as to why you left. No question was asked as to when you left, anything like that. It was just accepted that you were probably retired, maybe, because of age -- nothing personal -- but I think that is --

"VOICE: -- name, too?

416 "VOICE: Yes, they did.

"VOICE: And what would they say about me, though?

"VOICE: Well, the indictment says that Laughlin, Forte, and you agreed to reach Smith, but that you are not indicted, and it says that in the indictment. Question by the press -- well, how come Bernice Gross was not indicted -- said, Well, Grand Jury chose not to indict Bernice Gross, and they said, Well, that must mean that she's telling the truth, and answer: Can't discuss the evidence. Answer by the press: Well, it's pretty obvious what it is. Subsequently talked to Mr. Laughlin -- as soon as he -- well, let me tell you, he asked the charges -- he and Forte, charges, conspiring to obstruct in the Smith case and his perjury, the Forte abortion on Hill and Joyce Johnson, bribery, they are the four counts involved in the Forte matter.

"VOICE: M-m-hmm.

Sullivan-Gross - Transcribed Recording

"VOICE: -- as soon as these things came back, because I didn't want some newspaper calling, make the news and hear it on a newscast, you know, so I called him, and I don't know how he took it. I really don't. It's awfully hard to estimate him, because you know he's a darn sharp lawyer and he's -- you never know if he's hurting inside and big bluff on the outside, and he said, 'Oh, I see, I  
417 see.' That's one of his favorite phrases.

"VOICE: Uh-huh.

"VOICE: And said, 'Well, what does -- what's the theory of the Grand Jury as to what I did?' And in -- to you, he said, 'Well, what do you have, Mrs. Gross' say-so, Mrs. Smith's say-so?' And I said, 'Well, just consider the evidence and, unfortunately, I am not able to discuss what that evidence is.'

"I assume from what he said that he figured you must have told the truth.

"VOICE: Yes.

"VOICE: Well, how come Jean Smith wasn't mentioned at all?

"VOICE: She was.

"VOICE: Well, how in the heck did she get involved in this?

"VOICE: She's mentioned; she's mentioned. Yes, she's mentioned throughout. She and Birge were mentioned, and Hill, but the three abortion -- alleged abortion

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victims -- Washington the first time, with the exception, I think, of the Post, and they said today that it would be their policy not to print the girls' names.

418 "VOICE: Yes --

"VOICE: So I don't know how they will handle that. Of course, it is a little bit different time this, but they said they are going to do it that way, so those are the answers -- paper --

"VOICE: No. What happened in Washington --

"VOICE: Yes.

"VOICE: Well, that is why I told you not to call anybody out there -- because then I would ask you to call the Hecht Company.

"VOICE: Right; will do.

"VOICE: If it doesn't, then they don't have to know.

"VOICE: Right.

"VOICE: You know what I mean.

"VOICE: I think, being realistic, there seems to me that at least there is a chance of something over there if it doesn't happen now, I suppose that either Laughlin or Forte, or someone, could say something later. I don't know, but it seems realistic.

"VOICE: There's going to be some trial because I know that Laughlin -- and he will try and dig up everything, but I hope you will be here to protect me.

"VOICE: Who's there to protect me, I mean?

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"VOICE: You are protected.

"VOICE: -- Mr. Laughlin said -- truth now.

"VOICE: I wonder what the hell he can do --

"VOICE: I think basically the kind of case it is, the only thing, the only way out is something -- as a phony because the truth gets awfully tight. It really does, so -- I suppose that false allegations can be made against anybody all the way down the line at this point.

"VOICE: Me, too.

"VOICE: They could say just about anything. Holy Mackerel.

"VOICE: So tell me, so where's -- in all this, what they going to do about him?

"VOICE: Well, there wasn't any piece of evidence that supported the allegations against him.

"VOICE: What did you think about it?

"VOICE: What did I think about it, personally?

"VOICE: I know from the beginning he had an honest reputation.

"VOICE: Uh-huh.

420

"VOICE: And, well, naturally, you hate to see someone accused who has a good reputation and accused in such a way that you suspect the accusers, because you have the word that there is some possibility, at least, that they are trying to reach Smith -- you know, so, well, I'm happy that -- it's -- like I say, I'm happy -- I'm

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happy that the way it developed. Sure, I'm happy, there is no doubt about it, it would be silly to say I wasn't happy.

"VOICE: I'm surprised --

"VOICE: Incidentally, while --

"VOICE: -- going away.

"VOICE: Yes, that's right; you told me.

"VOICE: -- wedding in New York.

"VOICE: I told Captain -- head of Homicide, that I wanted a tape recorder made available -- ever use it, but if you ever want to use it and somebody calls you, want to put it on tape, I'm not talking about --

"VOICE: Interesting to have -- but anybody call, say you better not tell the truth --

"VOICE: That's what I'd like to have.

"VOICE: I'd like to have you have a tape recorder, so in case anything happened, you know -- and seriousness, too, any phony calls or anything as even a little bit funny, not that we expect them, just on the chance that anything happens -- us about it, and if you want anybody,  
421 you know, if there's any phony business at all.

"VOICE: Don't worry --

"VOICE: But there is complete approval from the top down.

"VOICE: I'm not worried about Forte because -- but Laughlin, I don't trust him at all, I really don't.

"VOICE: Well, I guess nobody in our shop expects

Sullivan-Gross - Transcribed Recording

anything like that, but just on the possibility that it might happen -- Department of Justice right on down, that a Marshal will be available at any slight hint that you want them, so that is not to scare you, but --

"VOICE: No.

"VOICE: What the heck, don't mess around with those people if anything funny comes up.

"VOICE: -- I just don't like -- don't like -- at all. You know what he tells you, that -- about me, and I try to take -- shake Jean down -- he's capable of making anything up.

"VOICE: Yes.

"VOICE: That he knew who the father of the child was.

"VOICE: Yes.

"VOICE: I never heard anything so stupid.

422 "VOICE: Well, I know.

"VOICE: -- isn't that stupid?

"VOICE: Sure; then when you asked him, he asked you the same question how she --

"VOICE: M-m-hmm.

"VOICE: Which is the truth, too.

"VOICE: Of course.

"VOICE: Well, now that they have indicted him, you know -- you know that one time.

"VOICE: Did he?

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"VOICE: Who -- Laughlin?

"VOICE: M-m-hum.

"VOICE: And that was to meet me.

"VOICE: Oh, you mean in the beginning?

"VOICE: Huh?

"VOICE: In the beginning, you mean?

"VOICE: Uh-huh.

"VOICE: So he actually saw you face to face?

"VOICE: Uh-huh.

"VOICE: Holy mackerel.

"VOICE: But I didn't want to say nothing because  
I thought nothing would come of it.

"VOICE: You got the tape going?

"VOICE: Sure, I do, you know me.

423 "VOICE: I know you do.

"VOICE: See that --

"VOICE: Uh-huh.

"VOICE: Oh, I wish I had a tape for all the people  
that say 'Hey, you got your tape on?'. Nobody from the  
Police Department calls me -- bad reputation.

"VOICE: Anybody see you when he was there?

"VOICE: No; only person, night watchman.

"VOICE: Yes?

"VOICE: And -- went over to him, I don't know how  
he got to him. I was eating dinner and I don't know how  
the night watchman got -- to ask him, you know -- some

Sullivan-Gross - Transcribed Recording

people come in the store.

"VOICE: M-m-hmm.

"VOICE: Unless he asked for me and someone called the night watchman, and he went over to him -- but that I would be down here.

"VOICE: Well, --

"VOICE: No -- night watchman comes in at 4:00, closes the store.

"VOICE: Yes?

"VOICE: But whether he would, you know, remember it or not, I don't know, and I don't want to --

424 "VOICE: Yes?

"VOICE: Because, see, --

"VOICE: He does.

"VOICE: And everybody would know it.

"VOICE: Holy mackerel. Holy mackerel -- closed-mouth guy.

"VOICE: No, if I thought he would keep still --

"VOICE: Yes, well --

"VOICE: But in case he were needed --

"VOICE: Yes.

"VOICE: But unless you actually -- then I wouldn't want even him to know.

"VOICE: -- think about that -- big mouth, that would be so much easier. Is he an old guy, young guy?

"VOICE: He's not an old guy. He's got bad eyesight.

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"VOICE: Oh, fine.

"VOICE: I don't know if he would remember him, or not.

"VOICE: Yes?

"VOICE: I tell you what, you haven't got a picture of him?

"VOICE: Yes.

"VOICE: You do?

"VOICE: Sure.

425 "VOICE: Well, what you do, when I go back to work --  
and I am going on vacation next week --

"VOICE: M-m-hmm.

"VOICE: When I go back to work, come in the store.

"VOICE: M-m-hmm.

"VOICE: But you have to make it around 4:00 o'clock.

"VOICE: Uh-huh.

"VOICE: And we'll get him and go to my office, little  
cubbyhole.

"VOICE: And show him some pictures and see if he  
can pick him out.

"VOICE: Yes.

"VOICE: And you got something you can't -- you know,  
you'd make an ass out of yourself.

"VOICE: Actually, we could -- secrecy.

"VOICE: You know that it had to be kept secret, it would.

"VOICE: Yes.

"VOICE: But that is the only thing to do, and I promise  
not to say anything to --

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"VOICE: Yes.

"VOICE: I told him a little about it.

"VOICE: The night watchman?

426

"VOICE: Yes.

"VOICE: I told him a little about it, and he remembered him.

"VOICE: Holy mackerel.

"VOICE: He said that old gentleman that was here to see you.

"VOICE: And I said, yes, I remember, but what he looked like I don't know.

"VOICE: Do you think it would be better if -- contact the night watchman.

"VOICE: I don't think he would even remember -- Laughlin, wouldn't even remember.

"VOICE: Don't want him to get to him first.

"VOICE: No, I don't think he even knows who he was talking to.

"VOICE: H-mmm; I'll be darned. I'll be darned. Did Forte -- or --

"VOICE: I don't know. -- fact -- I don't know if it was his son that was with him, or his grandchild. I don't know if he has a son here or not.

"VOICE: He's got a son and a grandchild in -- Baltimore, because -- them all the time -- close to -- family.

Sullivan-Gross - Transcribed Recording

"VOICE: Got any more bombshells?

427 "VOICE: No, that's the only thing I kept back because I thought with that, then they certainly would have evidence to go on, and I said, well, without it, you know, maybe nothing would happen. Look, I was looking after me, too.

"VOICE: Yes.

"VOICE: But -- you know -- make it a little closer, make it a little tighter. I thought I'd mention it to you.

"VOICE: Well, I appreciate your mentioning it, but -- go back to the beginning and that would be the fall of '62.

"VOICE: Yes.

"VOICE: Maybe he would remember. I don't. I know it was before I was laid off, and I was laid off in February.

"VOICE: By God, you know that's funny. Laughlin said to me today, well, -- is the theory that I actually met with this, what's her name, Gross, and I said 'No, the Grand Jury charged that you talked on the telephone with her, never that there was any physical meeting -- oh, I see, I see,' he said. Then he said to me, 'Well, who was she anyway, was she a witness?' And I said 'Well, yes,' you mentioned her at the prospective hearing on  
428 voir dire about the blackmail -- well, she didn't testify, did she? No, she wasn't a witness, I don't think so, I told him -- I thought it was the fact -- there was no allegation that you had ever met -- I'll be darned.

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"VOICE: Well, you don't have to tell him everything.

"VOICE: No, maybe I have figures.

"VOICE: Maybe he figures --

"VOICE: Going to attempt to call you, get --  
extension or something.

"VOICE: I will be away now until Friday.

"VOICE: Bringing my dad back with me.

"VOICE: Uh-huh; is he going to stay with you?

"VOICE: Going to stay with me a couple of weeks.

"VOICE: Do him some good.

"VOICE: -- I have some time to stay with him.

"VOICE: Good. You know Dorothy Birge lost her  
mother, too.

"VOICE: Who?

"VOICE: Dorothy Birge, you know, the other girl.

"VOICE: Oh, did she?

"VOICE: Yes; I talked with her -- for the -- time.

"VOICE: I don't know her. I never met her, don't  
know anything about her, really I don't, not a thing other  
than she was Smith's girl friend.

429 "VOICE: M-m-hmm.

"VOICE: But I don't know anything about her, who  
contacted her, or anything.

"VOICE: M-m-hmm.

"VOICE: Now, you know everything.

"VOICE: Okey-dokel, I appreciate your effort.

"VOICE: Yes. And like I say, when I go back to  
work, come down with --.

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"VOICE: Yes, we've got some pictures anyway, looks pretty much the same couple years ago.

"VOICE: Well, bring the pictures -- said that he can't. There's no sense bothering with him -- you know what I mean.

"VOICE: O.K.

"VOICE: M-m-hmm. Well, -- any calls come by, let us know -- even if it sounds kind of phony, what the heck, we might as well check it out.

"VOICE: Listen, what I want -- tell --

"VOICE: Give her a call.

"VOICE: All right.

"VOICE: And I told -- about the indictment.

"VOICE: Yes.

"VOICE: You tell -- call her.

"VOICE: -- 6- --

430 "VOICE: 2310.

"VOICE: 2310?

"VOICE: Yes. Give her a call --

"VOICE: Okey-doke, fine.

"VOICE: All right. And if anything happens, I will be back Friday.

"VOICE: O.K., fine.

"VOICE: You know -- don't want the number in New York, do you?

"VOICE: Yes, I don't think there is any need for it,

Sullivan-Gross - Transcribed Recording

any publicity came, would you want to be called?

"VOICE: Yes, I want you to tell me.

"VOICE: All right, want -- give me the number  
up there.

"VOICE: It's Oliver -- 01.-3.

"VOICE: 01.-3.

"VOICE: 4183.

"VOICE: 4183; okey-doke.

"VOICE: Bronx.

"VOICE: In The Bronx.

"VOICE: So if anything breaks, please call.

"VOICE: Q.K.; I might not be up on it if it breaks  
over there, just by picking up the Washington papers and  
431 following something, but I will try to keep you, and maybe  
if Sergeant -- or -- keep my complement, double teaming.

"VOICE: Okey-dok,e thanks, now; goodnight now.

"VOICE: Right."

MR. LOWTHER: That completes the second call on No.  
17 for identification, call being on July 2.

MR. SULLIVAN: That's right.

MR. LOWTHER: I have also a notation here that on the  
same exhibit, 17 for identification, there is a recording of a phone  
call on July the 3rd, 1963.

MR. SULLIVAN: That's right.

(The tape was rewound.)

(Another recorded conversation was played, as  
follows:)

Sullivan-Gross - Transcribed Recording

"VOICE: Hello, yes I am on the line.

"VOICE: Mr. Sullivan?

"VOICE: Yes.

"VOICE: There is a collect call from Mrs. Gross;  
will you accept it?

"VOICE: Thank you very much, operator.

"VOICE: Hello.

"VOICE: Hello.

"VOICE: Hello.

432 "VOICE: Did you call me?

"VOICE: No, I didn't.

"VOICE: Oh.

"VOICE: I'm down at the hospital visiting my  
father-in-law.

"VOICE: Yes?

"VOICE: And I called my father.

"VOICE: Yes?

"VOICE: And he says you had a call here.

"VOICE: Oh.

"VOICE: And I said 'Who was it?'. He says 'I  
don't know, but the operator asked for Bernice Gross,  
so I don't know whether' -- I didn't know whether it was  
you or Sergeant Diven.

"VOICE: Uh-huh, but she wouldn't be out of town,  
would she?

"VOICE: No, but I gave her my number and yours,

Sullivan-Gross - Transcribed Recording

you know, in The Bronx, in case anything breaks in the papers. I guess she called me --

"VOICE: I will be darned.

"VOICE: See, so I don't know whether anything broke or not, and I was hoping it was you rather than --

"VOICE: No -- the Washington papers all through mentioning your name, but very, very little publicity compared to what we expected.

"VOICE: Oh, really?

"VOICE: Very well; one of the papers called you Bernice, Bross, B-r-0-s-s.

"VOICE: What did they say?

"VOICE: I don't have a copy with me, copy of the Star, but I have the copy of the News, biggest article -- says -- in trouble, charged with conspiring, perjury, and so on, and he was asked if he ever talked on the telephone with a woman named Bernice Bross. He answered, no, and the indictment said that he lied -- so on -- charges Forte and says -- here's the gist of it, tells the story of the Smith abortion and then, for the first time, it mentions Smith had trouble in Baltimore Hospital, questioned by a Baltimore policewoman, mentioned you, who tipped off Washington police. That is what the story says, says that -- went to work on Bernice Gross and -- from September, '61 till the trial was well under way in February -- tried to put pressure on Baltimore woman and her friend.

Sullivan-Gross - Transcribed Recording

"VOICE: That sounds like we were badgering her,  
which is so false.

"VOICE: September, '61, too, so -- the article  
434 doesn't say anything further about yours at all. At the  
end of it, it mentions Wallace and misquotes me -- so that  
was about the --

"VOICE: Well, maybe that's what she wanted to tell  
me, because I know it wasn't in the morning paper, in the  
Baltimore Sun --

"VOICE: Uh-huh.

"VOICE: And I listened to the radio up until Delaware,  
and I didn't hear anything on the radio.

"VOICE: Uh-huh.

"VOICE: So maybe she wanted to tell me what was  
in the Washington paper.

"VOICE: I see. The call was to your mother in New  
York?

"VOICE: No, my sister's --

"VOICE: No, I didn't -- until about 11:30 -- call  
today, though.

"VOICE: Because I called her and I told her what  
the story was.

"VOICE: M-m-hmm.

"VOICE: And I said -- number, get the Washington  
papers.

"VOICE: I see. Well, she probably saw at least

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that. It was on page -- front section, page 3 of the  
435 Washington paper.

"VOICE: Well, as long as it stays in Washington.

"VOICE: Yes, let's hope so.

"VOICE: Well, in other words, this is the most  
publicity they will get today.

"VOICE: Yes, all of it came in today and they were  
arraigned. He and Forte both pled not guilty and demanded  
an early trial, and the Judge advised them that there was no  
trial date available during the summer.

"VOICE: You know, I understand that he's pretty  
good in Washington.

"VOICE: Uh-huh.

"VOICE: That he's not going to let this go.

"VOICE: Yes.

"VOICE: Well, --

"VOICE: He's an old bear, quite a reputation, been  
around a long time.

"VOICE: Well, that's what I wanted to know --

"VOICE: Yes.

"VOICE: And, look, are you going to call me?

"VOICE: Call --

"VOICE: I will.

"VOICE: Call her now.

436 "VOICE: I'll call her shortly.

"VOICE: Call her now, save me a call. Call her now

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downtown, if that's what she wants to tell me, tell her I already know.

"VOICE: O.K., because I do have to call her any-way --

"VOICE: O.K.

"VOICE: O.K.

"VOICE: That's O.K.

"VOICE: Tell her if that's the news she wanted to tell me, tell her I already know.

"VOICE: O.K., take good care, bye-bye."

MR. LOWTHER: That completes the call July 3, 1963, appearing on Government's Exhibit 17 for identification?

MR. SULLIVAN: It does.

MR. LOWTHER: All right.

(The tape was rewound.)

MR. LOWTHER: Now I am handing you Government's Exhibit 18 for identification, which, according to my notes, is a call July the 8th, 1963, some other calls on the -- on this exhibit.

MR. SULLIVAN: O.K.

MR. LOWTHER: This call that is about to be played is dated what, if you recall?

437 MR. SULLIVAN: It is in the afternoon of Monday, July 8th.

MR. LOWTHER: All right; go ahead.

MR. SULLIVAN: Yes, sir.

(Thereupon, the conversation referred to was played, as follows:)

Sullivan-Gross - Transcribed Recording

"VOICE: Hello.

"VOICE: Hello.

"VOICE: How are you?

"VOICE: Fine.

"VOICE: Weather the storm O.K. ?

"VOICE: Yes.

"VOICE: Has there been any publicity over there?

"VOICE: No.

"VOICE: Good.

"VOICE: You made that call, didn't you?

"VOICE: Yes, I did.

"VOICE: Because I didn't get another call.

"VOICE: Yes, she said she called up there just to  
tell you about the -- it hit the Washington Star article.

"VOICE: Well -- because otherwise, you know --  
and I didn't want any of that.

"VOICE: Good enough.

438 "VOICE: So what's news?

"VOICE: Just give you a call about that night watchman.  
See what we could work out. My boss is kind of anxious to  
get it under way. I thought the best way to do it would be  
the way you suggested, kind of wait some time until it's  
convenient, but I would like to -- just in case.

"VOICE: Well --

"VOICE: In fact --

"VOICE: Uh-huh.

Sullivan-Gross - Transcribed Recording

"VOICE: Oh -- have to be very smart.

"VOICE: He is.

"VOICE: -- remember anything like that.

"VOICE: He's some kind of lawyer, pretty smart lawyer.

"VOICE: Huh?

"VOICE: Say he's some kind of lawyer, pretty smart man -- might remember, but -- told us about any -- from Laughlin, because when he talked to me after -- return, he said, well, what's the theory of the case? I said that you and Forte both got together and -- he said 'Got together?' And I said, 'Well, you know --'. Meeting, get together --. You know, I thought I was squaring with him, so he said 'Oh, I  
439 see.' So he might figure that you -- mention that one.

"VOICE: Well, only thing, have to wait till I --

"VOICE: Let me talk to you -- or have you come down to the D.A.'s office or U.S. Attorney's office over in Baltimore -- time, not let him know what it's about until he arrives there -- if you want to during the day, and that way there'd be no meeting down at the store. That is the only advantage I can tell you on that point.

"VOICE: Well, it's not a matter about the -- rather be down the store -- don't want anybody here to know.

"VOICE: Well, nobody there would know, -- police station, just get a line in the office, over our U.S. Attorney's office, do that. How about his house, is that bad?

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"VOICE: I don't know where it is --

"VOICE: M-m-hmm.

"VOICE: Nobody.

"VOICE: M-m-hmm.

"VOICE: -- come in, ask for me.

"VOICE: M-m-hmm.

"VOICE: I don't even know where the guy lives,

440 I really don't.

"VOICE: M-m-hmm.

"VOICE: And I wouldn't want to worry his wife.

"VOICE: Because I don't know what kind of a woman --

"VOICE: When are you going back; next Monday?

"VOICE: That would be O.K., then.

"VOICE: M-m-hmm.

"VOICE: How is Monday? Could we play tentatively  
for then?

"VOICE: M-m-hmm, Monday is fine.

"VOICE: O.K. Well, I'll give you a call in advance --

"VOICE: I don't go in until Monday, 10:00 o'clock,  
but call me like, you know, fine.

"VOICE: All right.

"VOICE: So I think we might take a ride on over some  
day this week anyway, and I'd like to find out which of the out-  
fits over there -- Jean Smith -- lot of money supposedly  
floating in the other case, so I'd like to find out --

"VOICE: I'd like to find out, myself.

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"VOICE: (Laughing.)

"VOICE: I really would.

441 "VOICE: You know, if what he said is true about all that money being thrown, I'd like to know where it went, myself.

"VOICE: Yes.

"VOICE: He never mentioned anybody else --

"VOICE: Well, he probably did mention -- Smith case -- creditor spying on Jean, private eyes --

"VOICE: No, except that he used one guy once, he might use him again --

"VOICE: Well -- anybody else ever -- I really don't. She never told me.

"VOICE: No, she wasn't contacted, but people checked on her credit because they knew her upside down.

"VOICE: Oh, oh. I mean --

"VOICE: M-m-hmm.

"VOICE: All I know is you know what --

"VOICE: M-m-hmm.

"VOICE: And I do want to see -- anyway, I want to talk to you in person.

"VOICE: O.K.

"VOICE: Alone?

"VOICE: Alone.

"VOICE: All right.

442 "VOICE: O.K.

"VOICE: Doesn't have to be this week -- you know.

Sullivan-Gross - Transcribed Recording

"VOICE: Well -- and I will give you a call.

"VOICE: O.K.

"VOICE: O.K.

"VOICE: Good enough.

"VOICE: I mean not being personal.

"VOICE: No, no; made a record, be clear if I had my machine.

"VOICE: You got it recorded.

"VOICE: O.K.

"VOICE: Okey-doke.

"VOICE: Goodbye.

"VOICE: Rightto, goodbye."

MR. LOWTHER: That completes the call July 8. Will you find the next call and identify it, please?

MR. SULLIVAN: Yes, sir.

(There was a short pause.)

MR. SULLIVAN: I found the call. This is the call, I believe, in the afternoon of Friday, July 12, '63.

MR. LOWTHER: Very well.

(Thereupon, the call referred to was played, as follows:)

"VOICE: Hello.

"VOICE: Mrs. Gross on the line.

443 "VOICE: Thank you very much.

"VOICE: Hello.

"VOICE: Hello, Mrs. Gross, how are you?

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"VOICE: Fine.

"VOICE: Fine.

"VOICE: Yes, I am, thank you, on the line; sorry had to wait so long. Were you waiting a long time on the last call?

"VOICE: Yes, the operator wouldn't wait any longer, said could only hold over for three minutes.

"VOICE: Oh --

"VOICE: Yes; what's up?

"VOICE: I'm going away for the weekend, going down to the beach.

"VOICE: Good; have a good time.

"VOICE: Thank you, I will.

"VOICE: M-m-hmm.

"VOICE: But I think I will probably take Monday morning off, or a couple hours Monday morning. I said last time I'd give you a call when, Monday afternoon.

"VOICE: Oh, well, listen, I may not go in Monday.

"VOICE: Yes?

"VOICE: Because I was expecting my sister to come in -- my father next week, but if she couldn't come in,

444 I'm going to take Monday, Tuesday, and Wednesday.

"VOICE: Are you?

"VOICE: I am off Tuesday and Wednesday, anyway.

"VOICE: Uh-huh.

"VOICE: So I'm going to take Monday.

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"VOICE: Oh, yes -- well, I'll give you a call from wherever I am --

"VOICE: I'm so worried this might -- you know, I told you, because I had -- that I could level with you, you know.

"VOICE: M-m-hmm.

"VOICE: But I'm afraid at this point -- you know, might lose my job -- any other job -- that would involve the Hecht Company --

"VOICE: Yes, I see the point.

"VOICE: And I -- for the future.

"VOICE: Yes, you do, no doubt about that.

"VOICE: -- Hecht Company -- they might not go for that.

"VOICE: Yes. Well, that is true, too.

"VOICE: So I wish you would think about it before you, you know, do anything about it, you know.

"VOICE: Oh, heck, I would definitely think about  
445 it before thinking about using it as a piece of testimony or evidence.

"VOICE: Uh-huh.

"VOICE: Yes.

"VOICE: Look, I say they might not go for that at all. I could see their point. Why use the Hecht Company as a meeting place?

"VOICE: Yes.

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"VOICE: Understand? This is a big outfit.

"VOICE: That's right.

"VOICE: Yes, I know it's something to think about.

We got -- well, I think -- I would definitely think about it before using it as a piece of evidence in a public trial, but I'm pretty inclined to think that it would be a wise move to interview the buy, just in case Laughlin knew that he'd talk to that guy there and he tried to approach him, and that something else is made out of it, you know? I'd like to have -- at least, that is my impression now, but we'll think about it.

"VOICE: Well, think about it, and -- that's for sure, but this -- I mean, I --

"VOICE: Yes?

"VOICE: Believe me, this could -- you know that.

446 "VOICE: Yes, I do know.

"VOICE: Being it was the Hecht Company property -- to me, I was thinking about it so hard, and I came up with -- I don't -- that is O.K., but just don't -- not to use it if you don't have to.

"VOICE: Yes, I could see that it could hurt. It would be better from the point of view of employment that --

"VOICE: -- talk to your boss and ask him.

"VOICE: Yes, will do.

"VOICE: There is one thing, you know, about hurting in the future -- there's nothing mentioned in the indictment

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about the hundred-dollar Christmas present from Forte to you.

"VOICE: Uh-huh.

"VOICE: And there was nothing mentioned about -- well, you know there was nothing mentioned publicly about that.

"VOICE: Uh-huh.

"VOICE: Now, question: If there is any way -- I haven't figured out how it could be done, but if there is any way the defense could say, yes, look, there is no doubt about it that money was passed -- hands, but it was -- we thought it was for an innocent purpose or some such thing --

447 "VOICE: For some innocent purpose, you know, suppose Laughlin and Forte say that. The question came up, what if Laughlin and Forte say, look, if you really got money, you're a good citizen, you must report it on your income tax, so the question would be -- next -- did you --

"VOICE: The answer is no.

"VOICE: No, because -- you know --

"VOICE: Yes.

"VOICE: And he didn't know nothing about it, so --

"VOICE: Yes, I assume that it wasn't reported, and I assume Smith's isn't reported, either.

"VOICE: Yes.

"VOICE: I don't know how she considered it or how she would consider it on reflection. She might not consider it a

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gift or maybe wouldn't consider it an income for that reason, and maybe consider it partial payment, medical bills, and maybe under some theory she did report it, and very practical ones -- way you get money like that, don't talk about it, as a rule, but just a question to be aware of that might possibly come.

"VOICE: Well --

"VOICE: Why, if Forte -- deducted it.

448 "VOICE: That is true, too. He didn't. He didn't.

No; I checked.

"VOICE: Well --

"VOICE: Got nothing to worry about.

"VOICE: Well, either that or -- has something to worry about -- by the other telephone call, you know.

"VOICE: That could be.

"VOICE: Yes.

"VOICE: Well -- give you a buzz Monday, wherever I am Monday morning -- I didn't mention it to the police, or the fact anybody in my office, with the exception of one man who's the big boss here, the fact that there was a meeting over there, so no policeman knows about it -- Preston -- anyone, so it's strictly between Mr. Acheson and me, as far as information goes, and that's it.

"VOICE: In coming over, now, I arrange in trying to -- this night watchman over there -- I haven't told him why, but -- check credit agencies.

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"VOICE: Now, I -- hello?

"VOICE: Yes, I'm here.

"VOICE: As far as Acheson goes, -- do that. How  
about this business that you mentioned --

"VOICE: I changed my mind -- something that I have  
449 been --

"VOICE: -- uh-huh.

"VOICE: Can I ask you one question about it: Anything  
to do with any kind of -- information.

"VOICE: No; see if I could prove what I wanted --  
it would be different, but I can't --

"VOICE: Well, I'm sure you know my feelings on it,  
even if you can't prove it -- there have been an awful lot of  
funny things going on, and -- important to find out what the  
real story is, an awful lot of things --

"VOICE: O.K.

"VOICE: All right.

"VOICE: O.K.

"VOICE: All right.

"VOICE: O.K., fair enough.

"VOICE: Fair enough -- on that -- could shoot out,  
do something. Something could be talked over quickly --  
I'm just --

"VOICE: -- what?

"VOICE: I thought you said a letter.

"VOICE: Something I wanted to talk over with you

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just as a friend, find out what to do.

"VOICE: Fair enough.

450 "VOICE: I will find out --

"VOICE: O.K.

"VOICE: Well --

"VOICE: O.K.

"VOICE: Well, you call me Monday because I won't be in, and if I do go in I will be here till 9:30.

"VOICE: Fine.

"VOICE: O.K.

"VOICE: Good enough.

"VOICE: Have a good time. '

MR. LOWTHER: That completes the call of July 12, 1963.

Will you locate the next one, please, Mr. Sullivan?

MR. SULLIVAN: Yes, sir.

(There was a short pause.)

(Mr. Laughlin conferred with Mr. Garber, and Mr. Laughlin left the Courtroom.)

MR. LOWTHER: If we get to it before you get back, will it be all right to run --

MR. LAUGHLIN: Yes, that's what I said.

MR. LOWTHER: Very well.

MR. SULLIVAN: I have reached that point on the tape where that call occurred.

MR. LOWTHER: Can you give us the date, please?

MR. SULLIVAN: Yes, sir -- I believe -- I haven't

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heard it recently, but I believe this call is the call between Mrs. Gross and me on July 25, 1963.

MR. LOWTHER: Very well.

MR. SULLIVAN: In any event, it's after the Wallace-Gross call, July 24, and shortly after those.

MR. LOWTHER: Very well.

(The tape referred to was played, and Mr. Laughlin returned at or soon after the beginning of the playing of the said tape.)

"VOICE: Hello.

"VOICE: Mrs. Gross on the line.

"VOICE: Thank you.

"VOICE: Hello.

"VOICE: Good morning, how are you?

"VOICE: I'm fine, Mrs. Gross, very good.

"VOICE: Well --

"VOICE: Well -- I have an electronic recording equipment in my office at the moment. It's been delivered by the Police Department to me. I came back to Washington last night, went up to Sam's house, went up to Silver Spring in my car to pick it up -- called Sam, went on up to his house, stayed up there until about quarter to one this morning.

"VOICE: I just wanted to see him to talk, and he  
452 never mentioned the two phone calls yesterday. He never mentioned it at all.

"VOICE: Did he mention the one?

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"VOICE: He mentioned the one he made, but didn't mention the one you made, nothing about a traffic ticket, and plenty of opportunity but he didn't mention it and I didn't ask him directly because there was no basis for my knowing it.

"VOICE: Right.

"VOICE: He said you got -- he said there was no meeting, and swore and be damned, as he put it -- which -- said there was no meeting but, he said that you said it would be all right to talk to you over there today.

"VOICE: Yes, and I said -- I told the boss what had developed up to the point he called you back, and I said, of course, I didn't know what happened there, and the boss said not to talk to Mrs. Gross unless I -- either have a witness on the extension phone or tape it, so I said what I'd do, said I'd talk to the boss in the morning and I agree with you, Sam, that it wouldn't be a good idea to push her to a personal interview now because she's pretty hot. I'll get a tape recorder tomorrow morning from the internal investigating department of the Metropolitan Police Department, which I did, 453 had it brought over here this morning so I could check it all out, and so I just talked to Sam, called -- call Mrs. Gross, put it on tape, asked her, did you have the meeting. She -- no, you have it on record, and just let it drop at that -- because no sense -- so Sam just said getting the call back, so that was how it went.

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"VOICE: Yes; I didn't play it, though. I didn't play it.

"VOICE: -- so I didn't listen to the second one yet, because I didn't have the machine and I got this one just now, so -- that, too --

"VOICE: No, I was on the phone.

"VOICE: Oh, you were on the phone; that's right.

"VOICE: In the event Sam should call, would you -- maybe you -- go -- told Jerry and Barbara not to mention that I was there.

"VOICE: So let's see, I guess that's about the whole scoop. So I spent a long time.

"VOICE: Well, -- another tape.

"VOICE: In case he calls, why don't you --

"VOICE: What do you call it, what do you get?

"voice: Just a reel of tape for tape-recording  
454 machine. I got a 5-inch reel, doesn't make any difference, get a 7 if you want it, because we'll pay for it.

"VOICE: O.K. --

"VOICE: -- I don't know -- goofed or not, but it could have been covered up when I called -- told her, you know, that -- mentioned that I had just been there and I just left and tried to get Sam on the phone, right after we hung up the operator called and said, 'Did you just get a call from Baltimore on the -- ', so that means that not only after you talked to Sam but after I talked to him, supposedly from the Washington area.

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"VOICE: Well, I think that was the same operator had forgotten my name or my number, or something.

"VOICE: Well, it could be, but if she called him twice, might still think it was the one call, unless -- did you just get two calls from Baltimore?

"VOICE: Yes.

"VOICE: Then I asked charges, -- yes -- because I wanted to know how much they were.

"VOICE: Yes.

"VOICE: Because I didn't know the phone number and I told her --

455 "VOICE: Sure saved the Government some money.

"VOICE: I -- I don't know what --

"VOICE: H-m-hmm; I'll be darned. Well, I guess it's O.K. on that. Well, Sam's going to go on vacation.

"VOICE: That's what he said.

"VOICE: -- because I am due to go on --

"VOICE: Yes, I think I'm going to take two weeks anyway.

"VOICE: -- well, anyway, are you going to call me again?

"VOICE: Well, I think I will just sit back now. I'm going to tell Sam that we talked, and I told you we're at least not going to ask them over until your father goes back, and that we are not going to come today, and I asked you on the phone, was there a meeting -- said to me 'No, there is no

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meeting, ' and that that's what happened today, that you were much calmed down and I didn't ask you anything about -- well, you didn't mention anything about the call you made to Wallace, so we don't know anything about that.

"VOICE: So I guess that covers just about everything.

"VOICE: Well -- how you feel, how you feel about it.

456 "VOICE: Well, I feel good enough to know -- last night looking a guy straight in the eye -- I don't like the feeling of kind of spying on somebody. I don't. Never -- did it before, just didn't like the feeling, you know -- oh, I'm glad I thought about that. I did tell Sam one thing -- I told him that I checked the Telephone Company call because the boss was surprised to learn that I hadn't, so I checked them yesterday. Oh, he said I don't know -- probably call Smith and Gross, but said I know I never talked to Forte, and I said, no, there is -- but there was to Mrs. Smith.

"VOICE: -- called.

"VOICE: Yes, I got them yesterday.

"VOICE: I mean from way back.

"VOICE: No. Well, they only have them back 12 months, so couldn't go way back; went back to last July.

"VOICE: If you had checked them right away --

"VOICE: Oh, boy.

"VOICE: I know you would --

"VOICE: Right.

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"VOICE: I don't know why -- what they have.

"VOICE: Oh, he said that?

"VOICE: Uh-huh.

457 "VOICE: Wow!

"VOICE: -- don't know why they'd do it. I don't know  
what they have. I said, well --

"VOICE: Yes?

"VOICE: Said the whole thing sounds too funny --

"VOICE: M-m-hmm.

"VOICE: Somebody else.

"VOICE: That's right.

"VOICE: I see.

"VOICE: Got a nice place out there, really worked  
hard on it. Most of the work is his own, he said --

"VOICE: O.K.

"VOICE: Yes, sure. Well, okey-doke, and I will  
talk to you definitely before I take off on vacation.

"VOICE: Yes, O.K.; thanks again.

"VOICE: Bye.

"VOICE: Right; bye-bye."

MR. LOWTHER: That completes the July 25th call and,  
according to my notes, there is one more call on this tape, which is  
Government's No. 18 for identification?

MR. SULLIVAN: That's right, sir.

MR. LOWTHER: Very well; and, in addition to that one  
call, there should be one further call on Government's 19, on September

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458 30th, 1963.

MR. SULLIVAN: That's right.

MR. LOWTHER: Very well.

(Defendant Forte left the Courtroom.)

MR. SULLIVAN: I found the next spot on this tape.

MR. LOWTHER: Very well.

MR. SULLIVAN: The next recording on it.

MR. LOWTHER: And will you tell, please, when as best you recall, this phone call was made, date of it, that is?

MR. SULLIVAN: I believe there was one made on July 25th as well, between Mrs. Gross and me, concerning the events of the night before, and pick-up of the recording equipment from her home before I went away on vacation.

MR. LOWTHER: Very well.

(The recording referred to was played, as follows:)

"VOICE: Surprised?

"VOICE: Yes -- let you wonder who it was.

"VOICE: I was, and here I wasn't even ready.

"VOICE: Did you get a tape today, or not?

"VOICE: No, I forgot.

"VOICE: I was just going -- a call, guess I won't.

"VOICE: I -- going to call and ask you about it.

459 "VOICE: Just missed you; called after you left, I guess.

"VOICE: Yes, sir, that's what they said.

"VOICE: Oh, boy. You know, I was going to call

Sam tonight because I think I might take off tomorrow on

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vacation. I was thinking I might give him a call just to mention that I was going to subpoena your Telephone Company records and that would make him -- well, make him realize he had to make a decision with respect to your call to him last night -- never mentioned.

"VOICE: Well, he wouldn't.

"VOICE: No, and I never asked.

"VOICE: Yes.

"VOICE: Tell him he called me.

"VOICE: Right.

"VOICE: Right, but I think if he knew that I was going to subpoena your records, I think he might call you back and say, 'Well, we better have that straight,' what it's about, I don't think he'd take a chance on, you know, my calling and asking you what it was about, calling and asking him -- well, I wouldn't do it, then.

"VOICE: I wouldn't do it then, that's all right.

460

"VOICE: What are you going away for?

"VOICE: He's not going away until Monday.

"VOICE: You.

"VOICE: Oh, I'm -- trying to work on a couple of things, get them finished up and go away.

"VOICE: I -- call me when you come back.

"VOICE: Oh, okey-doke, and -- one problem.

"VOICE: Might have to return the tape recorder to him.

"VOICE: Would you -- home tomorrow.

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"VOICE: Call Hecht Company store.

"VOICE: I won't be working.

"VOICE: Oh --

"VOICE: I might be working Monday and Saturday.

"VOICE: -- catch you or somebody home.

"VOICE: -- come on anyway.

"VOICE: What's your dad's name? I don't know  
what to call him.

"VOICE: Gorman, G-o-r-m-a-n.

"VOICE: Okey-doke.

"VOICE: All righty.

"VOICE: O.K.; good many things; good night."

MR. LOWTHER: Now, that completes the four calls on  
Government's Exhibit numbered 18 for identification; is that right?

461 MR. SULLIVAN: That's right.

MR. LOWTHER: Very well. While that is being rewound,  
I am handing you Government's 19 for identification, which I think con-  
tains one call on September the 30th, and when that tape is off, I will  
ask you to put it on and locate it, please.

MR. SULLIVAN: All right, sir.

MR. LOWTHER: Very well; this is the call of September  
30, 1963?

MR. SULLIVAN: This is.

MR. LOWTHER: Being on Government 19; very well.

(Thereupon, the conversation recording was  
played, as follows:)

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"VOICE: Hello.

"VOICE: Hello, Mrs. Gross.

"VOICE: Thank you. Hi, Mrs. Gross.

"VOICE: Hello.

"VOICE: I'm sorry to be so late in calling back.

"VOICE: That s all right.

"VOICE: Well, you sound better than last time I talked to you.

"VOICE: Well, I figured you were going to help me out.

"VOICE: I talked to Mr. Acheson. I talked to  
462 Mr. Lowther. I didn't talk to Sergeant -- though, I will, though; I give her a call.

"VOICE: Yes, I talked to Mr. Hantman.

"VOICE: So I talked to all the men, but I will give Sergeant -- a call. Do you think I should ask -- call you back, because you said she would want to be called 6:30?

"VOICE: She'll be home.

"VOICE: Will he?

"VOICE: She'll be home -- 6:30, on.

"VOICE: I have locked up the Telephone Company records in the vault for the night with the tape recordings. I have got to. I will get her number from you before I --

"VOICE: Yes.

"VOICE: Listen, number one, to be perfectly level,

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I am in my other office right now. It's been suggested that I turn on the machine, so it will be turned on. Nobody else will be monitoring the call, but the machine will be turned on, and the purpose of it is, you know, any discussion -- that they wanted it down exactly on tape because -- well, because, frankly, even -- conversation -- never revealed to anyone, the tape of the -- that Judge Youngdahl, as he should be, is a real stickler on people  
463 telling the exact truth, exactly as something happened -- they wanted -- exactly, so we'll know what -- talking about, so I want to level with you and tell that first so, click, you're being recorded."

(Defendant Forte returned.)

"VOICE: No, you.

"VOICE: I can really louse you up now.

"VOICE: No, no, no; I have good faith in you -- you will do and just tell the truth.

"VOICE: Well, if I thought you'd be doing something like that, I wouldn't be telling you that on a recording, so --

"VOICE: Go ahead -- I gather that they can't do anything.

"VOICE: Well, here's the exact thing, they didn't want to -- nobody here wanted to promise more than they could produce. That is the fact. Like I told you down in Joe's office that first day, there is no immunity

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statute in this area -- I don't mean this geographical area, but I mean in the area of this investigation. There is no immunity statute, and here it is -- best I can recap are Acheson's own words as to what he said, that so long as you are a cooperative, truthful witness, as you have been, 464 he would push -- well, first of all, he told me I could assure you that so long as you are, I would push that with him and that is the truth and, secondly, more important to you, I think at this point, because I hope you know that I would, is that he, Acheson, would push that fact before any Court, before any Grand Jury, and that is the honest-to-God fact, that the fact of the tremendous cooperation given -- truth -- will be pushed, and I explained it, and you sounded to me panicky and concerned, and so on and so forth.

"VOICE: No, nobody.

"VOICE: No; you know I --

"VOICE: You what?

"VOICE: Yes.

"VOICE: Yes. Well, now, listen, just so that there is nothing unclear on this, I know what you are talking about. You know what I am talking about just after this tape is -- told -- you mean knows incidental things in connection with the Police Department in Baltimore, I take it.

"VOICE: That's right.

"VOICE: That was the thing about --

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"VOICE: All right; fine. Now, Joe put it in some  
465 words, and Mr. Acheson agreed 100 percent when he said  
that although no promise can be made because, like was  
said in the first place, the Grand Jury is an independent  
body, it's an arm of the Court, and so on and so forth,  
and we can't make any promises, but Joe put it in these  
words and everybody present agreed with him a hundred  
percent, that we would never stint -- that was the word  
he used -- in making the facts of and truth of your coop-  
eration known, and that is a promise, he said it, emphasized  
and repeated it, and really, honest-to-God, believe me,  
believe me that is it.

"VOICE: I hope that you do, and, well, to be per-  
fectly honest -- all of them thought that when we talked  
about this now, and they said, well -- going to do, but  
maybe she would -- if that is how she feels, because you  
can't put a promise -- but -- honestly, that you can take  
my word that we'll promise never, never -- and that is  
so true, we would never -- making that fact known that  
anyone -- that is the truth, really, really is.

"VOICE: No; stint, s-t-i-n-t.

"VOICE: Oh, no, no, no, I'm sorry, that is a term  
you use over there. We don't use that term -- over here  
like that, but, no, we were never stint -- in other words,  
466 we would never hold back in making the facts known to  
anybody interested how truthful and cooperative you have

Sullivan-Gross - Transcribed Recording

been, and it's never pleasant to come up and be truthful about things like this, but you have, you have done it already, the truth is out and -- the right thing to do, believe me, the right thing to do is to come tomorrow, right thing to do is to come and tell the truth, nothing but the truth, on every little thing. I don't know about this Chris Campbell thing that came up today.

"VOICE: Well ---

"VOICE: No. Well, let me say this on the Chris Campbell thing: I don't think we should hold back in putting anything on tape.

"VOICE: No, but I mean --

"VOICE: Yes --

"VOICE: Well, no, but let me tell you this: that more information came over here involving the name Chris Campbell after I talked to you, and that is to the effect that Mr. Laughlin had advised the Police Department that he says he has information that Wallace has shook down or has -- has shook down, got money from Chris Campbell, something like that, didn't give the basis for his information or anything about it, so the issue of Chris Campbell, 467 if it really is an issue -- if there is anything about it, it's going to have to come out.

"Now, I don't know, nothing to do with Chris Campbell over this fine, if there is -- anything -- along those lines, I still honestly think that the best thing to

Sullivan-Gross - Transcribed Recording

do is to come and tell the truth.

"VOICE: M-m-hmm.

"VOICE: Uh-huh.

"VOICE: M-m-hmm.

"VOICE: Well, I just don't know what -- what --  
when I say they, I mean --

"VOICE: No. Well, again, from what you have  
told me, I can -- well, in the first place -- talk Sergeant  
-- involved said -- Mrs. Gross and at this point --

"VOICE: No, I say that I do want to talk to Sergeant  
Diven, and I will -- this thing about Chris Campbell, I  
have heard his name and I have heard it as he, being a  
big-time abortionist.

"VOICE: Sure, about a yacht and all that, I don't  
know, but the second time -- that indicates to me an awful  
lot of strength, and it's really -- what his plan is going to  
be or what in this trial, but when he said that Forte -- he  
468 heard -- that Forte gave money to you and Dedmon and Sam  
Wallace seems to me like getting ready to throw Forte to  
the wolves if he is saying that. Because assume anybody  
could make up all that stuff or assume anybody told Mr.  
Laughlin about it, why in return would he mention it to  
someone else? I don't know, but Mr. Forte, Dr. Forte,  
is still his client. I don't know the exact reason, --  
planned thing, a -- heard it today -- whether it's an inten-  
tional thing -- I don't know.

Sullivan-Gross - Transcribed Recording

"VOICE: No, Garber.

"VOICE: Oh.

"VOICE: And that is that.

"VOICE: Oh, I thought you were the -- third and  
what you --

"VOICE: Umm.

"VOICE: Yes.

"VOICE: I didn't see Mr. Garber there. I saw --  
kind of smiled at me when I walked by.

"VOICE: Yes. Well, it's not altogether impossible  
that there would have been someone, they or someone else --  
get -- out of the city -- to have to check and see.

"VOICE: No, that --

469 "VOICE: I don't see any harm in --

"VOICE: Heaven's sakes, no, of course not, nothing  
wrong with that, no, at all.

"VOICE: M-m-m, yes.

"VOICE: And nothing --

"VOICE: -- today told me the --

"VOICE: M-m-m.

"VOICE: For the record --

"VOICE: Well, I have -- I have not asked Sam  
Wallace about whether or not he knows anything about a  
boat -- and I will not call him -- ask him that. I think  
if there is anything to any -- Sergeant Diven, I take it  
she said -- or Sam Wallace --

Sullivan-Gross - Transcribed Recording

"VOICE: M-m-m.

"VOICE: I don't know when you said that he knew  
that you were back with Diven today -- I don't think any-  
body here -- to me -- heck, I wouldn't think -- talking  
to --

"VOICE: No.

"VOICE: M-m-m.

"VOICE: M-m-m.

"VOICE: M-m-m.

"VOICE: Wonder what Mr. Laughlin --

"VOICE: M-m-hmm.

470 "VOICE: M-m-hmm.

"VOICE: I just don't know -- Forte -- money.

"VOICE: -- Forte suggested that there was one --  
certain -- certainly doesn't appear -- so that doesn't make  
sense.

"VOICE: True.

"VOICE: You what?

"VOICE: Huh?

"VOICE: I didn't hear you, I'm sorry.

"VOICE: -- not on what she said.

"VOICE: Oh, I want to talk to her.

"VOICE: Yes.

"VOICE: Hello.

"VOICE: Yes.

"VOICE: Yes.

Sullivan-Gross - Transcribed Recording

"VOICE: I'll talk to her and find out as much as closely as we can, exactly, what he said.

"VOICE: There's no relationship to Chris Campbell to this case factually or --

"VOICE: Certainly, but --

"VOICE: Did you ever meet him face to face --

"VOICE: M-m-m.

"VOICE: Oh, I --

"VOICE: In other words, you played like a pregnant  
471 girl, and you --

"VOICE: M-m-hmm.

"VOICE: M-m-m.

"VOICE: Yes. Well, look, I know the kind of setup that something like that can be, suspect a guy of abortion-ist -- but I know the kind of thing they are talking about, but because this is a record I want to make sure that you explain exactly what that is. I want that statement about unexplained coming back to haunt you.

"VOICE: M-m-m.

"VOICE: Yes.

"VOICE: Yes.

"VOICE: In the phone call would he talk abortion at all, would he come right out and talk it or not?

"VOICE: Uh-huh.

"VOICE: And --

"VOICE: Yes.

Sullivan-Gross - Transcribed Recording

"VOICE: Was that a steep price back then for him --

"VOICE: Was he a pretty high-priced abortionist or was that a pretty stiff price for him back then?

"VOICE: Well, that was when --

"VOICE: That is a big, expensive abortionist -- expensive.

472 "VOICE: Yes.

"VOICE: Yes, yes; O.K.

"VOICE: -- Campbell -- I think Sergeant Diven told me the other night about a county case in Campbell when he was up in the Pennsylvania quarter there were supposed to be two girls --

"VOICE: Well, I mean, it wasn't -- case, but -- she explained how she testified at the preliminary hearing, because the -- said the abortion was in a certain place and apparently the State had charged it as having been another place --

"VOICE: -- first of all, I wonder if anybody called -- or if it was -- or if anybody called, who did call?

"VOICE: M-m-hmm.

"VOICE: Uh-huh.

"VOICE: Never heard of her --

"VOICE: Jean Smith told -- Hmm?

"VOICE: Huh?

"VOICE: I was just going to say that Jean Smith told me today that one of the cases -- encouraging her --

Sullivan-Gross - Transcribed Recording

taken care of her in Washington -- just went back -- before the case came on for trial, and she did say -- said she had been contacted --

473 "VOICE: I'm tired; right.

"VOICE: I'm tired, too.

"VOICE: Yes, I bet you are. I bet you are.

"VOICE: You work until 9:30?

"VOICE: Yes, m-m-hmm.

"VOICE: -- no, I said that Jean said, Jean Smith said when she told Sam Wallace before the case came to trial -- that you had called her and she called Sam Wallace and told him that you had told her something -- being taken care of over here in Washington, and not to worry about it ever coming to trial, Laughlin and Forte taken care of --

"VOICE: She said Sam said to her -- Sam said, he said -- see where -- facts come out in the trial -- see me in the trial, tell him what the facts are. I'm not dishonest, and I am honest, and she seemed -- ducking out of the trial -- dishonest, so she came up pretty much that and Wallace came up pretty much that --

"VOICE: Yes.

"VOICE: Well, I did -- talked to her --

"VOICE: Uh-huh.

"VOICE: That's right.

"VOICE: Well, I don't know, I just got done listening  
474 to the phone calls -- between Laughlin and yourself, and I

Sullivan-Gross - Transcribed Recording

have an amplifying system in the Courtroom now with fifteen speakers, so it doesn't have to be turned up real loud and blary -- chance to hear it good, and Judge, and so on, so it makes those tapes very clear.

"VOICE: Let me see, something does run through my mind -- the principal one, I think -- can't say it enough to you that the smart thing to do is just come in, as always, and tell the truth from top to bottom about it, everything --

"VOICE: Yes, but I will tell you -- facts will come out, I mean the he- -- case -- questions are raised, the jury came back, they chose to believe the story of the complainant in the case -- so I think that we can be assured that -- instruction -- the Judge -- just, for God's sake, tell the truth top to bottom -- they will see what the picture is.

"VOICE: -- got to have some faith in it when things come out loud and clear, people with common sense ought to see -- smokescreen --

"VOICE: Well, that's exactly right, that is exactly right.

"Listen, another thing that they asked me -- I mean, my boss asked me to -- with you -- never be any suggestion that these people have ever in any case -- suggested --

475

"VOICE: No.

"VOICE: No, but if you should get phone calls, you know, my home telephone number -- 658, call at any hour of the day -- not day now, it's night -- actually call -- office --

Sullivan-Gross - Transcribed Recording

"VOICE: Good.

"VOICE: No.

"VOICE: Uh-uh.

"VOICE: Oh, that's a good thing. If they ask any questions at all or anything like that, just perfectly free to go out and -- just like we said -- loud and clear, and no kind of smokescreen is going to cover up the facts.

"VOICE: That's great.

"VOICE: Well, testify --

"VOICE: Anything I have said all along, tell you the truth --

"VOICE: No, I think you -- tell the truth -- told Jean Smith the same thing today.

"VOICE: She did. She said 'Is Bernice still in contact with Mr. Laughlin and Dr. Forte?'. I said, 'Well, I hope not,' and I said 'Why?' You know, my  
476 ears kind of perked up, and she said -- I just didn't know -- figured that she'd been in contact with him before and maybe she was in contact again -- she said she wasn't driving at anything, but she said, no, no, no, she said I wouldn't -- well, I would -- contact me before they came and contacted him. She said 'Oh, no' -- that's what she said right in the beginning, too, so she -- I don't really think that the facts come out loud and clear -- and you know the quality of the evidence we have, you know what evidence we have.

Sullivan-Gross - Transcribed Recording

"VOICE: Well, in the last one was over that Smith case, and Mr. Laughlin said to me, 'Well, you had us beat' -- back to do something to distract the jury -- said it to me in the hall, in the presence of witnesses, and in this case -- facts so clear -- just come in loud and strong, there were the facts.

"VOICE: Well, I don't know, but I do know that the facts loud and clear came out --

"VOICE: Listen, if I call Sergeant Diven and raise the question that they thought this -- just in case anyone would -- and say that even though you said -- no promises were made, even though I said no promises were made -- or any kind of -- like that, just -- tape -- that wouldn't hold me back at all -- but now -- calling Sergeant Diven,  
477 no point me putting -- on the tape, and if I put one on tape and didn't put the other on tape, maybe somebody would -- that that I didn't tape the last one and maybe -- try some story that I destroyed a tape of the last call -- just let the machine go -- and -- because I wouldn't --

"VOICE: I will, I will level --

"VOICE: Well, the important thing is -- well, -- no matter who gets hurt, just tell the truth.

"VOICE: You know, let the chips fall --

"VOICE: Just about to say these people, but people messing around try -- to conjure up stories, whoever they are. They are just going to get caught in their own game

Sullivan-Gross - Transcribed Recording

because the truth is going to kill them -- what part of life they are in, truth is going to come out.

"Now, getting back to this case, truth is that here is just going come out loud and strong.

"VOICE: Well, listen -- give me a buzz, and if you want to -- when you talk to Mr. Gross -- about anything -- give me a call -- anybody else gives you --

"VOICE: Explain -- O.K., I appreciate it, and get in touch later tonight -- but don't be concerned. It will -- that's all you need -- come out loud and strong  
478 -- Joe Lowther, you have got a tough, good trial attorney -- nobody they lcan push around. O.K. ?

"Listen, I will talk to you before tomorrow morning -- want to talk to Sergeant Diven if anything comes up.

"VOICE: Okey-doke.

"VOICE: O.K., thanks; bye-bye."

\* \* \*

Excerpts from Transcript - Criminal No. 741-61Allan Forte - Direct Examination

168 BY MR. LAUGHLIN:

\* \* \*

172 Q All right, now, then doctor, let me ask you this question?  
Having in mind February 6, 1963, that was a week ago yesterday, did  
you have a telephone call from Officer Wallace?

A Yes.

Q All right, now tell us what time of the day or night that it was,  
and where were you when the call came?

173 A I was in my private office sitting at my desk.

Q What time?

A Oh, it was somewhere in the early afternoon around 2:00 o'clock.

Q All right, now what was said by the voice at the other end?

A The voice said to me, are you going to keep your appointment  
with me tonight at 8th and N? I said, whom am I talking to? He said,  
don't you recognize the voice? You have an appointment with me tonight  
at 8th and N. I said I know whom I talking to, and he said, be sure and  
come.

Q Now had you had a previous conversation or a previous arrange-  
ment with that same officer about a meeting?

A On the 30th of January when I was arrested in my office he  
was one of the arresting officers and in this particular occasion he was

Allan Forte - Direct Examination

the only person in my office, and I was walking the floor, pacing the floor nervously, and he said, don't be so upset, this isn't the worst of it, you see me next week, next Wednesday, meet me at 8th & N. There is a big bingo place there and maybe I can solve your matters for you.

Q Now then did you go to 8th and N on the night of February 6, sir?

A According to the prescribed time, precisely at 8:00 o'clock,  
174 I pulled up in front of this building and looking around to identify the location of the building, Sergeant Wallace approached my car, got into the car, and said, drive around the corner, it is too hot here. I want to talk to you.

Q And then did you have conversation with him?

A We did.

Q Around the corner?

A Yes.

Q How far did you drive?

A Oh, about a half a square around the corner.

Q All right now, will you tell us the substance of that conversation, sir?

A When he got into the car, he said, now don't believe the stories that you hear about this. He said it is not as bad as it looks. He said, what is it worth to you to get out of this? I said, I do not know what you

Allan Forte - Direct Examination

are talking about. He said, I will contact you later. I said when? He said, I don't know, but I will call you and let you know the prescribed time and place.

Q And to whom did you report that information, sir?

A To you.

\* \* \*

196

REDIRECT EXAMINATION

BY MR. LAUGHLIN:

Q Doctor Forte, Mr. Sullivan asked you questions about a figure of \$25.00 and a figure of \$2000.00. Did you ever tell Mr. Rothbard and me, that Officer Wallace at some time had suggested a payment of \$250.00 a month? Did you ever tell Mr. Rothbard and I that?

A Yes, that is some time ago.

Q Now did you tell also, Mr. Rothbard and did you tell me, that at some time he made a statement as to the payment of \$2000.00?

A Yes.

Q Now then when were those statements --first as to the \$250.00/ When and where was that statement made, sir?

A I received a call, that was around about two years ago when this previous arrest was made, and the party said to me: I would like to see you. I have gone some information for you. I said: Whom am  
197 I talking to? And he said: Well, I intend to identify myself. And

Allan Forte - Redirect Examination

he said: You come around the corner. I am in a Falcon, Ford Falcon and I will be around the corner. I will be sitting there. I am not wanting to hurt you. I will be a friend of yours. I will give you information that is worth something to you.

I told the auditor in my building, Mr. Jones, I said I had a peculiar call and this man told me to meet him out there and I said, will you come and see who this is, in case that I am in danger, you will try to protect me. He agreed and we went through the back door and he followed me and the car was out there and I recognized the officer.

Q And who was the officer?

A Sergeant Wallace.

Q And what was said?

A We drove around 8th and Randolph. We drove to Randolph and then around 8th Street, and we parked there. And he said to me, he said: I can save you some trouble. I have a list of names here, and he showed me a piece of paper.

Q All right, what was said as to any amount or anything of that kind? What was said, sir?

A He said, if you are wise for \$250.00 a month you can operate without being disturbed.

Q All right, did you tell him at that time that you were performing abortions?

Allan Forte - Redirect Examination

A No.

198 Q All right. Did you deny that you were performing abortions?

A I did.

Q All right. Now then also as to the incident or the circumstances involving the \$2000.00. When and where did that take place, sir?

A Both of these was after the arrest was made in this particular case. This was about a week and a half ago, when he said, well for \$2000.00 you can be taken care of.

\* \* \*

UNITED STATES

Defendant's Exhibit F for Identification

v.

IN RE: Pos. Viol. of  
22 DCC 201; 18 USC  
501, et al.

Grand Jury Room No. 1  
U.S. Court House  
Washington, D.C.  
January 1963 Grand Jury  
1 March 1963, Friday

PROCEEDINGS

MR. SULLIVAN: Call Mrs. Gross.

Whereupon,

BERNICE GROSS

was called as a witness.

DEPUTY FOREMAN: You do solemnly swear that the testimony you will give in the case now on hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

BY MR. SULLIVAN:

Q. Would you please tell us your full name?

A. Bernice Gross.

Q. And your home address?

A. 2715 Uhler Avenue, Baltimore 15.

Q. That is Mrs. Gross, isn't that correct?

A. Yes.

Q. Mrs. Gross, you are here under subpoena today, is that so?

A. Yes, sir.

Q. I might mention to the jury that Mrs. Gross was nice enough to come over this morning just under sort of an oral subpoena and be served here since the marshals missed her in Baltimore.

A. That's right, they did.

Q. In the course of a prosecution which just concluded here in

Bernice Gross - Direct Examination

Washington, Allan Forte was found not guilty of an alleged abortion committed by him in July, 1961, on a girl by the name of Jean T. Smith of Baltimore, Maryland. During the course of that trial certain allegations were made to the effect that Detective Sergeant Samuel E. Wallace of the Metropolitan Police Homicide Squad had approached Forte in August of '61, in January of 1963 and again on February 6th of 1963. Forte swore under oath during the course of that trial that Wallace approached him at those times and in several phone conversations over the period from the arrest to the trial, and that in those approaches Wallace told Forte that for a payment of two thousand dollars to Wallace he would take care of the case, or fix the case. The case being talked about is a case under our number 741-61. It was a four-count indictment; two abortions were charged, each in two different ways; one as an abortion and one attempted abortion. I don't know if you have that same statute in Baltimore or not?

A. Uh hum.

Q. But it was charged in that way. Prior to the trial the abortion and the two counts involving Jean Smith were severed from the abortion and the two counts involving a Dorothy Lee Birge. That matter is still pending trial; I believe the trial date is March 24th, 1963, or thereabouts. In any event, Forte alleged that Wallace tried to shake him down and fix the case on trial. He alleged that for the payment of 250 dollars Wallace assured him that he, Wallace, would give Forte police protection and he could operate as an abortionist with a clean bill of health here in Washington, D.C. During the same trial there was another allegation made -- this was out of the presence of the jury

Bernice Gross - Direct Examination

during the course of a motion to suppress evidence -- and that Dorothy Lee Birge testified that Forte had called, or a man who sounded like Forte, and spoke about paying Birge 300 dollars. She said she never accepted it and that basically that was the end of it. But that charge was  
3      made during the course of the trial.

Now it will be material to the Grand Jury's investigation now under way for us to determine whether there really was an attempt to obstruct justice during the course of the trial of that case by a policeman soliciting money from Forte to fix the case -- well, by a policeman soliciting money from Forte for even if not for fixing the case, for giving Forte a clean bill of health to operate as an abortionist, or by the policeman approaching Forte for money to obstruct justice in any way regardless.

It is material and significant that the Grand Jury find out all matters and we are conducting an investigation of witnesses under oath for that purpose.

Now since the Forte arrest in August of '61 there has been a subsequent arrest here in the City of Forte again for another alleged abortion of Mrs. Robert Hill. Although you have no contact in the Hill matter the Grand Jury is also investigating the possibility of that abortion having been committed by Forte on Mrs. Robert Hill, and it will be material to the Grand Jury's investigation to determine whether if there were attempts to obstruct justice in the Birge and Smith matter if they carried over and flowed into the Hill matter. These are the material matters that we are inquiring into.

Now with each witness that comes before the Grand Jury, even if they have police experience -- we went into that with witnesses this

Bernice Gross - Direct Examination

morning -- that I'm an Assistant United States Attorney and in that capacity do tell you as a witness, which I'm sure you already know, that you have a Constitutional right under the Fifth Amendment of the Federal Constitution to refuse to testify about a matter which might tend  
4 to incriminate you in any way. And in the Federal system we mean that you have a right to refuse to answer a question on a matter which might lead up or in the next logical series of questions open the door to a series of questions the answers to which might tend to incriminate you. So basically that is the caveat that we give to every witness that comes before us today.

Now, you do have police experience in Baltimore, isn't that correct?

A. Yes, sir.

Q. And you do understand that you do have that right under the Constitution to protect yourself against self-incrimination?

A. Yes, sir.

Q. Do you understand as I have explained it that it will be material to this Grand Jury's investigation to find out whether a member of the police force attempted to solicit money in order to fix the case or to claim that the case could be fixed, or to give Forte a license to operate as an abortionist or to obstruct justice in this matter in any way?

A. Uh hum.

Q. Understanding those things do you wish to invoke your right against self-incrimination or do you wish to testify?

A. I'll testify.

Bernice Gross - Direct Examination

Q. Fine. Now would you tell the Grand Jury what your police experience has been, Mrs. Gross?

A. Six years on the abortion squad in Baltimore City.

Q. And at the present time are you employed or are you working as a housewife?

5 A. I'm a housewife.

Q. When did you leave the squad in Baltimore?

A. February 21, 1962.

Q. Back in July and August of 1961 were you then assigned to the homicide squad working particularly on abortions?

A. Yes, sir.

Q. In the abortion squad work at that time did you participate in any way in the investigation of an alleged abortion allegedly committed on Jean Smith by Dr. Forte?

A. Yes, sir.

Q. Would you please tell the jury what your contact with the case was?

A. I was one of the original policewomen to take the first statement from Jean Smith in the hospital, St. Agnes Hospital, and I don't recall when we went back to her home with Sergeant Wallace -- and he was then a detective -- and a Detective Kelly, and we took another statement. Policewoman Burrell and the two men and myself. That was all.

Q. From that time up until the time you were subpoenaed to appear in the trial of the Forte matter involving Smith and the related matter of Birge, did you have any contact with the case by way of investigation at all?

Bernice Gross - Direct Examination

A. Just the subpoenas that I received cancelling, and that's it. No knowledge of anything since then.

Q. And in your contacts with the U.S. Attorney's Office here in Washington do you recall to whom you spoke in the preparation of the case?

A. I don't think I spoke to anybody except you.

Q. All right.

A. That's all.

6 Q. And the conversations between you and me, were they the ones related to the trial date of February 11th, or 12th, in which the trial actually began in this last series?

A. Yes, that's right.

Q. Just for the Grand Jury's information, did you or did you not testify in the trial?

A. No, I did not testify.

Q. Were you excused by me?

A. Yes, I was, by you.

Q. All right. Now going to the allegations that were made, Forte testified that Wallace approached him on three specific occasions face to face; August of '61, January of '63 and February 6th of '63. First, did Sergeant Wallace or anyone acting on his behalf attempt to arrange to fix the cases that we have just talked about for Allan U. Forte to your knowledge?

A. No, sir.

Q. Did Sergeant Wallace or anyone to your knowledge approach Forte to seek money in return for taking care of or fixing the abortion

Bernice Gross - Direct Examination

matter involving Dorothy Birge and Jean Smith related to the abortions allegedly committed in July of 1961?

A. No, sir.

Q. Did Sergeant Wallace or anyone else to your knowledge approach Forte and seek money in return for giving Forte protection to operate as an abortionist without being arrested in the City of Washington, D.C.?

A. No, sir.

Q. Now Forte testified that Wallace approached Forte in August of 1961 with such an offer. Do you have any knowledge of such an approach  
7 by Wallace to Forte?

A. No, sir.

Q. Forte testified that Wallace contacted Forte on January 30th, 1963, with such an offer as we have just described to take care of or fix the case. Do you have any knowledge of that specific contact?

A. No, sir.

Q. Forte testified that Wallace contacted Forte on February 6, 1963, with such an offer that Wallace would take care of the case or permit Forte to operate as an abortionist without being arrested. Do you have any knowledge of that specific contact?

A. No, sir.

Q. Even though specifically that contact allegedly took place at 8 and N Streets, Northwest, near the Immaculate Conception Church in this city near the site of a bingo game, with that specific information do you know any more about that alleged contact?

A. No. I don't even know where that is.

\* Bernice Gross - Direct Examination

Q. Did you speak to Wallace or anyone who purported to be representing Wallace or acting on his behalf concerning this story of Wallace approaching Forte for a shake down, so to speak?

A. No, sir.

Q. Did you speak to Forte or anyone acting on his behalf concerning the story that Forte would tell that Wallace did approach Forte for a shake down?

A. No, sir.

Q. Did Wallace approach you and ask you for any money in  
8 return for any act or favor that you might do in connection with the investigation of the alleged abortion on Jean Smith and Dorothy Birge, both taking place allegedly in July of '61?

A. I haven't seen Wallace or spoken to him since the statement we took, and that being something like 18 months ago.

Q. So is your answer then to that question no?

A. No.

Q. Did Wallace approach you for money in return for any act by you or favor from you concerning the alleged abortion on this Mrs. Robert Hill, which matter is now under investigation by this Grand Jury?

A. No, sir.

Q. Did anyone purporting to be acting on Wallace's behalf approach you for money in return for any act or favor that you might perform in connection with the Smith abortion, the Birge abortion in July of '61, both of those, or the Hill abortion in 1963?

A. No, sir.

Bernice Gross - Direct Examination

Q. Did Wallace give you any money or anything of value in return for any service or act by you concerning the alleged abortion on Smith without talking to you face to face?

A. No, sir.

Q. Did anyone in Wallace's behalf or whom you knew to be acting on Wallace's behalf or who said he or she was acting on Wallace's behalf approach you either in person or indirectly and give you money or anything of value in return for any service or act by you concerning the alleged abortion on Smith --

A. No.

Q. -- in '61, Birge in '61, or on Mrs. Robert Hill in '63?

9 A. No, sir.

Q. Did Allan U. Forte or anyone representing himself to be acting on Forte's behalf approach you and give you any money or anything of value in return for any service or act by you concerning the alleged abortion on Dorothy Birge in '61, on Jean Smith in '61, or on Mrs. Robert Hill in 1963?

A. No, sir.

Q. Were you contacted by anyone representing himself to be acting on behalf of anyone in the Metropolitan Police Department, even if not Wallace, and offered any money or anything of value for any act or service you might perform in connection with the alleged abortion committee on Jean Smith in July of '61, on Dorothy Birge in July of

Bernice Gross - Direct Examination

'61 or on Mrs. Robert Hill of this year?

A. No, sir.

Q. Were you contacted by anyone representing himself to be acting on the behalf of Allan U. Forte and offered money or anything of value for any act or service you might perform in connection with the matter of the alleged abortion of Jean Smith in July of 1961, Dorothy Birge in July of 1961 or the alleged abortion on Mrs. Robert Hill in January of 1963?

A. No, sir.

Q. Were you contacted by an attorney purporting to be speaking for Detective Samuel Wallace and asked to perform any service by him in behalf of Wallace in connection with the matter which I have described to you as currently under investigation?

A. No, sir.

Q. Were you contacted by an attorney representing himself to  
10 be Forte's lawyer and offered any money or anything of value in return for any service you might perform in connection with the alleged abortion of Jean Smith in July of 1961 --

A. No, sir.

Q. -- or Dorothy Birge in July of 1961?

A. No, sir.

Q. Or Mrs. Robert Hill in January of 1963?

A. No, sir.

Bernice Gross - Direct Examination

Q. Other than the pay checks you received from the police department for your official duties did you receive any money or anything of value for anything you did do in connection with the alleged abortion committed by Forte in July of 1961 on Jean Smith?

A. No, sir.

Q. Or Dorothy Birge of 1961, July of that year?

A. No, sir.

Q. Or the alleged abortion committed on Mrs. Robert Hill in January of 1963?

A. No, sir.

Q. Mrs. Gross, that concludes our series of questions, and the procedure we are following today is to take care of all witnesses and in case the Grand Jury has any questions based on what they have heard, the witness will be called back. Now we do have some additional two witnesses, one based on some information which we received this morning, and -- well, I discussed it on the phone with you last night, to the effect that Mrs. Smith -- well, just for the information of the Grand Jury, when we spoke on last evening we wondered about what possible reason there could be for the jury coming back not guilty in the case involving  
11 the alleged abortion of Mrs. Smith.

A. That's right.

Q. And I suggested that Mrs. Smith's answers in the trial weren't those strong forceful answers they could have been; there was a little bit

Bernice Gross - Direct Examination

of hesitation. And always in an abortion case there is embarrassment. Mrs. Smith, as I told you jurors before, has some four children and there is embarrassment that comes from that and coming to testify.

A. That's right.

Q. But in any event we have subpoenaed Mrs. Smith this morning to ask her a series of questions and to ask her simply if her testimony was in any way untruthful during the trial. She did testify Dr. Forte performed the abortion but I must ask her too the series of questions in connection with the possible approach by Sergeant Wallace to Forte.

So for the Grand Jury's information, it is 11 o'clock, if you want to take your coffee break which you do at eleven, you can take about twenty minutes' coffee break as usual. We have two other witnesses and I think we can excuse these ladies from Baltimore if everything goes smooth.

Thank you, Mrs. Gross.

(The witness was excused).

Bernice Gross - Direct Examination

MR. SULLIVAN: Recall Mrs. Gross, please.

Whereupon,

BERNICE GROSS

was recalled as a witness.

DEPUTY FOREMAN: Mrs. Gross you have already been sworn.

THE WITNESS: Yes.

DEPUTY FOREMAN: You are still under oath.

BY MR. SULLIVAN:

Q. Mrs. Gross, between eleven twenty this morning up until -- I guess it's a little after two, this afternoon, you and Mr. Joseph Hannon, a man identified to you as Chief of our Civil Division in the office, met in Mr. Hannon's office in the presence of the court reporter - not the one sitting here, but a Mr. Dyer, do you recall that?

A. Yes, I do.

Q. During that period of time you did make a statement, isn't that correct?

A. Yes, I did.

Q. In that statement, in essence, you did say that Allan U. Forte  
2 did contact you on a number of occasions in Baltimore and passed money to you, some of which you kept yourself and some of which you passed to Jean T. Smith?

A. That's right.

Bernice Gross - Direct Examination

Q. And that the purpose of that money passing to Jean T. Smith was to persuade her not to appear as a witness in the Forte trial involving Jean Smith's abortion, involving such things as getting her to write letters to the United States Attorney's office seeking to be excused from the case, and that there was discussion between you and Jean Smith concerning the possibility of Jean not recognizing Forte at the trial, is that correct?

A. That's right.

Q. Now, these thoughts were not your original ideas but they were thoughts given to you by Forte?

A. That's right.

Q. Your statement this morning then when you mentioned you were not contacted by Forte or anyone on your behalf you do wish to correct before the Grand Jury at this time?

A. Yes.

Q. Those statements were mistaken and erroneous?

A. Not as far as Mr. Wallace was concerned.

Q. No, but as far as Mr. Forte, and sworn in his behalf, contacting you?

A. Yes.

Q. All right. Are you prepared to swear now that the statement you gave in Mr. Hannon's office between a little after eleven and a little after two this afternoon today was true and correct?

3 A. Yes.

Bernice Gross - Direct Examination

Q. It was true and correct?

A. (Nods head.)

Q. In that statement you also said that you had several phone conversations with a man introduced to you by Forte, when Forte said to you, my lawyer will call you, whereupon a Mr. James Laughlin called?

A. I could not say whether it was Mr. Laughlin or not. I never met the man and I would not know.

Q. But a man identified to you by himself as Mr. Laughlin?

A. I don't know if he ever called his name out to me over the phone.

Q. Did Forte ever tell you that a Laughlin would call?

A. A lawyer, his lawyer would call me.

Q. Is my memory playing tricks on me or wasn't the name Laughlin mentioned a great number of times for three hours this morning?

A. It was mentioned.

Q. Did a man ever call you after Forte told you that Laughlin would call?

A. Yes.

Q. All right.

A. But whether it was he or not I don't know.

Q. You never met Laughlin face to face?

A. No.

Q. None of the money passed to you was passed by Laughlin?

Bernice Gross - Direct Examination

A. No.

4 Q. All of it was passed by Forte?

A. That's right.

Q. Subsequent to the not guilty verdict in the trial involving Jean Smith's abortion you did engage in a phone conversation again with Forte?

A. That's right, he called me.

Q. And you told us this morning, Mr. Hannon and me, that in that conversation you questioned Forte as to why he should tell the story he did about Wallace on the stand?

A. That's right.

Q. It is correct that you told us that you were a little bit mad at Forte for doing that, making up that story about a policeman?

A. Yes, I was.

Q. Did Forte say he made up that story by himself or at someone's instigation?

A. He said his lawyer told him to say that.

Q. I have no other questions at this time. There are three hours of questions and answers, thereabouts, that we can have read to the Grand Jury from the transcript that came before. Based on that if you all have any questions that you would like to ask Mrs. Gross we can have those questions answered. Is there anything of immediate information of Mrs. Gross, Mr. Deputy Foreman or ladies and gentlemen, that you would like to ask?

Bernice Gross - Direct Examination

DEPUTY FOREMAN: I have no questions.

BY MR. SULLIVAN:

Q. Just before the Grand Jury then one final thing. You did say,  
5 didn't you Mrs. Gross, that since you have come forward and told  
the truth now you would also be agreeable to having someone listen in on  
your extension phone tonight should Forte call you?

A. The only trouble with that is my husband doesn't know anything  
about this, and if somebody would have to tell him I --

Q. -- I think in fairness I should advise you if this Grand Jury  
matter results in an indictment of anyone it is going to be public informa-  
tion anyway. The possibility of your husband learning is extremely great.  
You can think that over yourself as a practical person.

A. I still would not like it in my house, I wouldn't.

Q. You see, we have no legal way of doing it except in your house?

A. Well, I was not going to answer the phone this evening because  
I don't want to have anymore conversations and I was going to New York  
today -- that's my home -- but I couldn't because I had to come here, and  
I know I'm going tomorrow. I'm not answering the phone tonight and if he  
knows I'm here he's just liable not to call.

Q. I have no way at all of forcing the answer from you. It has to  
be your personal choice.

A. I don't.

Q. Do you have any objection of making a telephone call to Mr.

Bernice Gross - Direct Examination

Forte before leaving Washington and chat with him on the phone, as well as one with James Laughlin and chat with him on the phone?

6 A. I would rather not.

Q. I understand that you would rather not, but your cooperation --

A. -- If I had to I would but if I don't have to I would rather not.

Q. On the record let me put this to you, all we want is the truth, you don't have to make those telephone calls?

A. I have told you the truth.

Q. Fine, but the thing we talked about on the record down in Mr. Hannon's office I'll say it right before the Grand Jury. I said to Mrs. Gross that the big fish behind an operation like this are the ones who are most guilty. The only possible way of getting the people who are putting up the money and instigating the plans of this operation is by the cooperation of someone who is in between, that is the only way to make the case on the big people. We need Mrs. Gross' cooperation and the Grand Jury's decision as to whether they would indict you for the perjury you committed this morning would be largely determined by the measure of your cooperation. You would not have to make the telephone call. You see my point?

A. I know your point very well. I understand your point very well.

Q. Mrs. Gross, you are an experienced police woman?

A. I am, very.

Bernice Gross - Direct Examination

Q. You know the point?

A. I realize your point but I say I would rather not. If I did not have to I would rather not. If I had to I would. There is nothing I can do.

7 DEPUTY FOREMAN: Mr. Sullivan, I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we can. I think you can tell this witness and any other witness, in or out of this room, that we'll go after him. We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.

MR. SULLIVAN: Thank you Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?

A. Okay.

MR. SULLIVAN: Thank you very much for your cooperation in telling the truth today.

(Witness was excused.)

1 MR. SULLIVAN: Call Sergeant Wallace.

Whereupon,

SAMUEL E. WALLACE

was called as a witness.

DEPUTY FOREMAN: You do solemnly swear that the testimony you will give in the case now on hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do, sir.

BY MR. SULLIVAN:

Q. Please state your full name.

A. Samuel E. Wallace.

Q. Your home address?

A. 605 University Boulevard West, Silver Spring, Maryland.

Q. Your occupation?

A. Policeman; Detective Sergeant, assigned to the Homicide Squad of the Metropolitan Police Department, Washington, D. C.

Q. How long have you been on the force?

A. November the 17th, 1947.

Q. How long have you been on the Homicide Squad?

A. About nine years.

Q. In your work at the Homicide Squad, Sergeant Wallace, have you had any specialty?

A. I worked on a lot of abortion cases, if you would call that a specialty.

Samuel E. Wallace - Direct Examination

Q. All right, sir. You did work on the case of United States against Allan Forte, 741-61; isn't that correct?

A. I did, sir.

2 Q. Did you participate in the arrest of Forte on August 5, 1961?

A. I did, sir.

Q. You testified in the trial that grew out of that arrest; isn't that correct?

A. I did, sir.

Q. Your testimony in that trial, was it true and correct?

A. It was, sir.

Q. During the course of that trial Forte alleged that you tried to shake him down, that for a payment of money to you the case would be fixed. During the course of that trial you testified to the effect that you never tried to shake Forte down, nor anyone else, nor did you ever suggest a possibility of that to anyone, as the question was posed at the trial, in the whole wide world. Was that true?

A. That is true.

Q. All right, sir. We have no other questions at this time, except what I would like you to do now is, please arrange that Mrs. Smith be taken to Municipal Court to this office --

(Mr. Sullivan indicated off the record).

(The witness was excused).

Tuesday, March 26, 1963

Whereupon

27

SAMUEL E WALLACE

was recalled as a witness on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

## EXAMINATION ON BEHALF OF THE GOVERNMENT

BY MR. SULLIVAN:

Q. Sergeant Wallace, would you state your full name for the record once more.

A. Samuel E. Wallace.

Q. You are the same Samuel E. Wallace who appeared before this Grand Jury?

A. I did, sir.

Q. And as a result of certain information which came to the attention of the United States Attorney from Mr. James J. Laughlin, did there come a time in the past several days that you checked out a story provided us by Mr. Laughlin that Jean Smith of the Baltimore area had a record or a reputation as a call-girl and prostitute?

A. I did check it out.

Q. Would you please tell the Grand Jury briefly what you did and the results of that check.

A. I called Lieutenant Newcomer of the Baltimore State Police and he went to Baltimore, checked the Criminal Record Division there. He found that she had been charged, not in Baltimore, but in the County,

Samuel E. Wallace - Direct Examination

28      for drunken and disorderly on one occasion; and I believe it was in the early part of '62. That is the only record she had.

She also is a -- he did a thorough check, as far as the car and everything else. There was one point on her. She was listed as Jean Titcombe Wmitch, white, 130 pounds, birth --

Q. Is that the Department of Motor Vehicles?

A. Motor Vehicles, that's correct.

And the woman that was charged with drunk and disorderly was Jean Althea Smith. She was a white female, 145; but other things he had checked turned out to be one and the same.

As far as her husband goes, he is clean. We have his car. And that's about it.

Q. Thank you, Sergeant Wallace.

A JUROR: Mr. Laughlin seems to be throwing around an awful lot of accusations.

Did you make any better check than this? Now, he had made an accusation here that she is a call-girl.

THE WITNESS: That's right.

JUROR: So we have a charge that she was drunk and disorderly.

THE WITNESS: That's right.

JUROR: That can mean almost anything. It might be a  
29      policeman doesn't like the way you're talking, if it happens to be

Samuel E. Wallace - Direct Examination

that type of policeman. And incidentally, this man who checked it out there, has his name been mentioned in this before?

MR. SULLIVAN: He had been mentioned in the unit who checked on the inter-state abortion activity, Wallace, the officer from Virginia and the officer from Detroit and the captain there.

JUROR: We can't actually know for sure that this is the same Mrs. Smith, do we?

THE WITNESS: Apparently, it is from the description.

JUROR: Let's get away from this "apparently," Sergeant.

THE WITNESS: All right.

JUROR: This man Laughlin has made a charge.

THE WITNESS: That's right.

JUROR: Now, the only thing we have come up with is that we have a drunken charge.

THE WITNESS: Drunk and disorderly.

JUROR: Drunk and disorderly.

THE WITNESS: Yes.

JUROR: We don't even know it's the same person for sure.

THE WITNESS: That's right.

30

BY MR. SULLIVAN:

Q. May I ask you, Sergeant Wallace, to contact Newcomer and find out the background on that drunk and disorderly charge and also ascertain from Mrs. Smith whether, in fact, she has ever been arrested.

Samuel E. Wallace - Direct Examination

You can do that either directly through yourself -- I think that would be better perhaps.

A JUROR: We had this charge interjected into this case against this Hill woman, the same charge. I don't know what they are going to try to dig up on her. Mrs. Johnson came in here, and you know what she said. And I think in the future, on these witnesses we have had an awful lot of counter-charges here, and a lot of people make counter-charges when they are trying to cover up something against themselves. And I think we should be awfully careful before we get into the record any aspersions or any innuendoes, because I think this Grand Jury wants to hold this testimony on a little higher standard than Jim Laughlin's concept of trying a law case. That's all I have to say.

MR. SULLIVAN: Any other questions, ladies and gentlemen?

(No response.)

BY MR. SULLIVAN:

Q. Thank you, Sergeant Wallace.

31 A. There's only one other thing I would like to add. If you want me to, I will find out also if they fingerprint these people when they arrest them; and I will have it sent to the Federal Bureau of Investigation and see if they have any record.

THE DEPUTY FOREMAN: You see our position, Sergeant. We have a responsible source; we have a very common name; and we've got a charge that could mean a lot, or it could mean nothing. So we

Samuel E. Wallace - Direct Examination

think the record should be very clear on this.

A JUROR: Didn't Jean Smith mention something about some hotel or something?

MR. SULLIVAN: I believe the testimony that you might be thinking of is that of Bernice Gross, keeping a material witness in a hotel. And according to Mr. Laughlin's testimony, at that point, when Gross was supposed to keep the witness in the hotel, they left the hotel room and went around the block, and as a result of that activity, Mrs. Gross left the force.

That's my recollection. I don't know if there is anything in addition to that.

(Witness excused.)

(The Witness returned to the hearing room.)

THE WITNESS: I called Mrs. Smith, I asked her the circumstances of the arrest. She said she is the one that (sic - omission of line). She and her husband were having a family argument, and the  
32 neighbors called the police. And that's it.

A JUROR: So it's a long way from being a call-girl.

THE WITNESS: A long, long way.

JUROR: Thank you.

BY MR. SULLIVAN:

Q. Thank you.

(Witness excused.)

Fe

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES J. LAUGHLIN  
ALLAN U. FORTE

Appellants

Nos. 19562 and 19563

v.

UNITED STATES OF AMERICA

Appellee

BRIEF ON BEHALF OF APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

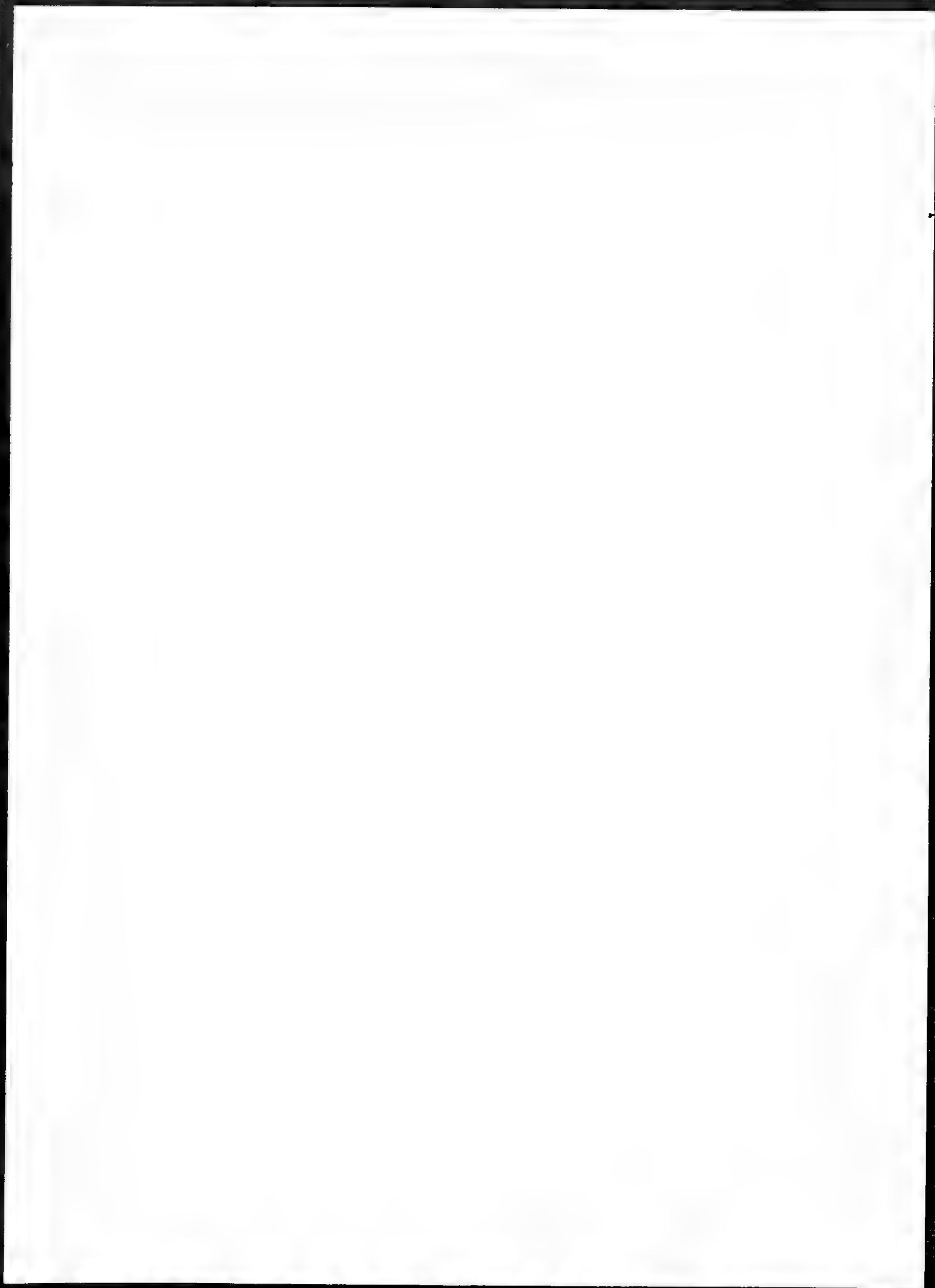
United States Court of Appeals  
for the District of Columbia Circuit

James J. Laughlin  
Appellant in proper person

FILED NOV 21 1966

William J. Garber  
Counsel for Appellant Forte

*Nathan J. Paulson*  
CLERK



### STATEMENT OF QUESTIONS PRESENTED

- (1) Whether the reading of a withdrawn count, consisting of another offense, amounts to prejudicial error necessitating a mistrial.
- (2) Whether the refusal to instruct the jury that a reasonable doubt may arise from lack of evidence constitutes reversible error.
- (3) Whether the doctrine of collateral estoppel or res judicata barred the reception in evidence of telephone records.
- (4) Whether the indictment should be dismissed when it is shown that the grand jury was inflamed against the appellant.
- (5) Whether the evidence was in effect the "fruit of the poisonous tree."
- (6) Whether the coercion of a witness violated the due process clause of the Constitution.
- (7) Whether the indictment should have been dismissed when it is shown that the prosecuting officials violated the law in several instances in preparing the prosecution.
- (8) Whether the action of the prosecuting officials in arranging a certain telephone recording between two government witnesses without the consent of either and denying the appellants the right to the use of the contents thereof nullified the trial.
- (9) Whether the tactics pursued in this case offend our public policy.
- (10) Whether there was a lack of fundamental fairness in the bringing of the indictment, the preparation for trial, and the trial itself and this lack of fairness reached the level of constitutional protection.
- (11) Whether a conspiracy can be shown by the sole testimony of a co-conspirator who has been discredited and whether the declarations of a co-conspirator can be received in evidence before there is evidence of a conspiracy.
- (12) Whether it is reversible error to refuse an instruction as to the defendant's theory of the case when a request is made and there is evidence in the record to support such a request.
- (13) Whether it was error to refuse an instruction as to the failure of the government to call as a witness a police officer who was himself under investigation and who played an important role in the preparation of the case.

- (14) Whether it was error to impeach the appellant Dr. Forte on the basis of a conviction in North Carolina of many years standing and for which he had received a pardon, and it was error to refuse a cautionary instruction to soften the effect of the prejudice arising thereby.
- (15) Whether cross examination was restricted when the court refused to require the witness Gross to reveal the source of the \$500.00 to effect her reinstatement to the police force in Baltimore.
- (16) Whether the jury was misled and confused and in doubt as to the law governing conspiracies.
- (17) Whether in the light of the recent Dennis case and liberal attitude now existing as to discovery in criminal cases whether there was error in denying to the appellants the entire grand jury minutes in this case.

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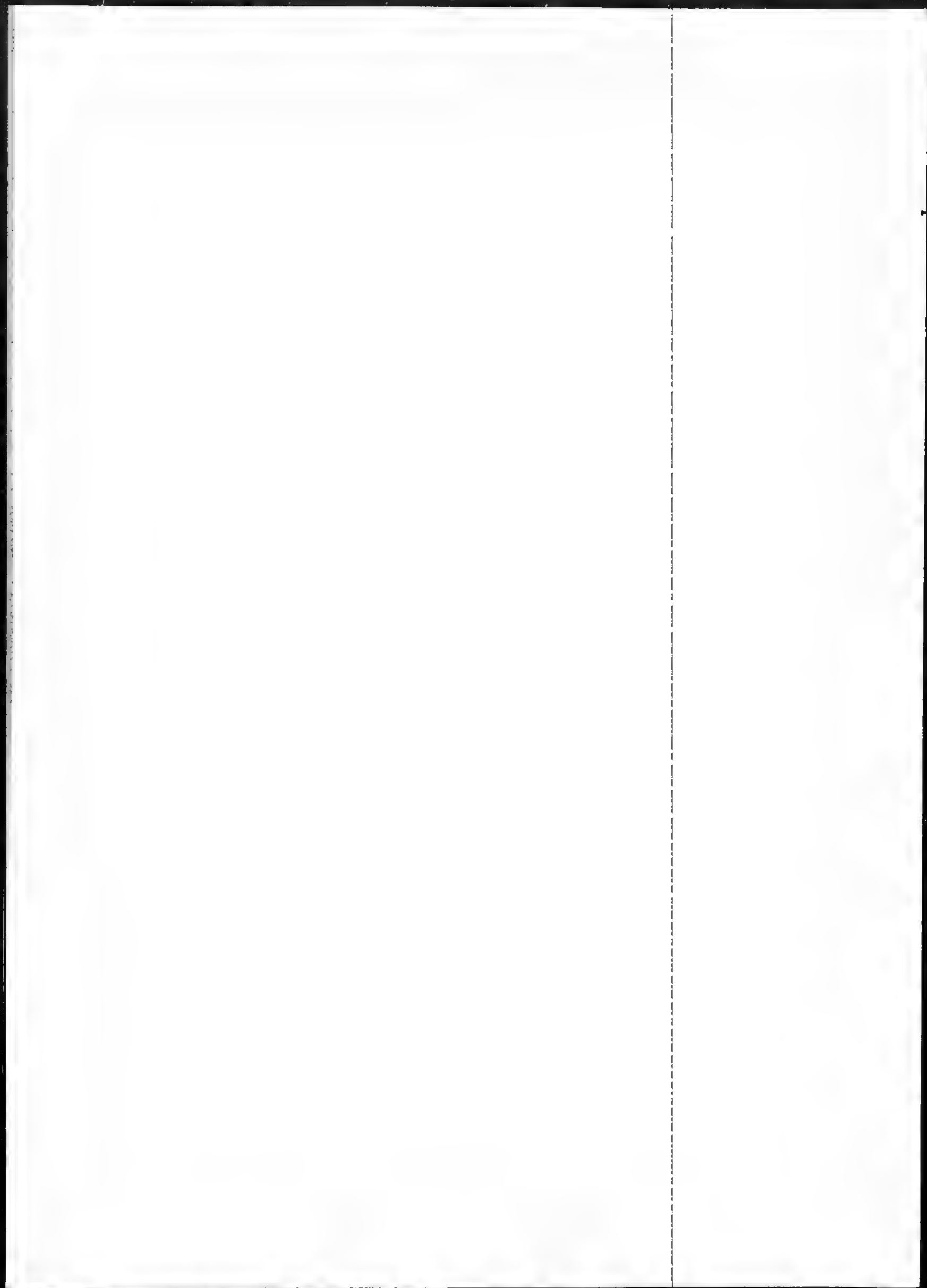
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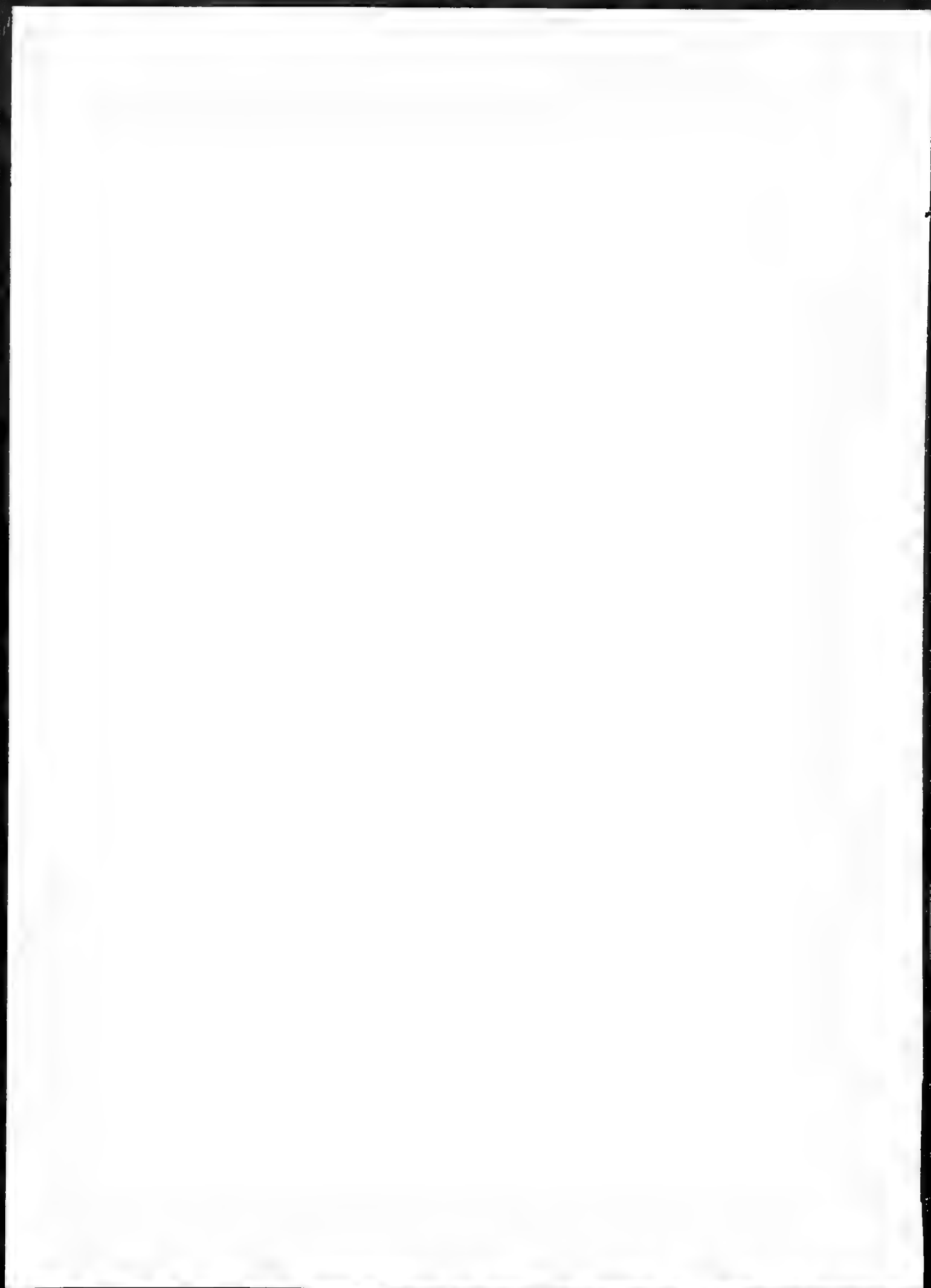
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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES J. LAUGHLIN  
ALLAN U. FORTE

Appellants

v.

UNITED STATES OF AMERICA

Appellee

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Nos. 19562 and 19563

ARGUMENT

1. The trial judge committed a reversible error when he read to the jury a withdrawn count of the indictment, which charged another offense and the failure of the trial judge to correct his own error sua sponte.

2. A trial judge cannot when requested refuse to instruct the jury that a reasonable doubt may arise from the lack of evidence.

3. When an important issue of the fact has been litigated by the same parties and resolved by final judgment, the same evidence cannot be used in any future litigation involving the same parties.

4. When a grand jury has been and becomes biased, then the indictment cannot stand.

5. If at the beginning of a prosecution evidence is obtained unlawfully and in violation of the constitutional rights of the accused, all knowledge gained from the use of such unlawful evidence becomes "fruit of the poisonous tree."

6. When in a criminal prosecution it is shown that government officers violated certain criminal statutes, the indictment must be dismissed.

7. When the totality of evidence shows that the testimony of a government witness was coerced to the extent that her will was forced to do the bidding of the government, the due process clause was violated in the trial of the defendants.

8. There was a denial of a fair trial when it was shown that the government officials arranged a telephone recording in violation of the Federal Communications Act, in that the recording was made without the consent of either party, and the government was able to use the contents of the recording in the trial's preparation but the use of the same recording was denied to the defendants.

9. The methods used by the government officials in bringing about the indictment and preparing the case for trial offend our public policy.

10. Fundamental fairness was lacking in bringing the indictment and preparing the case for trial, and this lack of fundamental fairness fatally infected the trial and violated the due process clause.

11. When evidence of a conspiracy depends upon the testimony of a coconspirator who has freely admitted many acts of perjury, such a conviction cannot stand.

12. The testimony of a coconspirator cannot be received until there has been substantial evidence of the existence of a conspiracy.

13. When an instruction is tendered outlining a defendant's theory of the case and there is evidence to support it a denial of such instruction constitutes reversible error.

14. When a police officer, himself under investigation, is very active in the preparation of the case a defendant is entitled to an instruction as to the inference arising when the government fails to call such witness and in any event it is error to prevent argument in this regard.

15. In the circumstances of this case it was an abuse of discretion to question appellant Forte in North Carolina many years ago and it was error to deny an instruction which had the effect of attenuating such conviction when such explanation would have revealed that he had received a pardon at the hands of the Governor of the State.

16. When an effort to prove the existence of a conspiracy by the virtual testimony of one witness, of doubtful credibility, the denial of cautionary instructions on the law of conspiracy constituted reversible error.

17. When the credibility of the main witness had been greatly undermined, if not completely destroyed, the appellants should have been permitted to elicit from her the source of the so-called "bribe" to effect her reinstatement to the police department.

18. When the present tendency is toward more liberal discovery in criminal cases the appellants were entitled to the complete grand jury minutes in this case.

STATEMENT OF THE CASE

This case comes to this Court after judgment entered on verdict of guilty. The indictment charges conspiracy and obstruction of justice. Title 18, Section 371 and Title 18, Section 1503. APP. 1-12.

A criminal case No. 741-61 had been tried in the United States District Court and in that case Dr. Forte was charged with performing an abortion on one Jean Smith. The trial resulted in an acquittal. It was contended by the government that the appellants acting through one Bernice Gross, a former police woman in Baltimore, endeavored to influence the testimony of the said Jean Smith and induced her to write certain letters to the United States Attorney to the effect that she did not desire to prosecute. The case hinged almost entirely on the testimony of the said Bernice Gross, in addition to some telephone records. APP. 16-18. The complaining witness Jean Smith testified that she had no contact with either appellant and was paid no money by either appellant. The testimony will show that the case hinged almost entirely on the testimony of Mrs. Gross. She testified that acting on instructions from appellant Laughlin she requested Mrs. Smith to write a letter to the United States Attorney asking that the case be dropped. She testified that at no time did she receive any money from the appellant Laughlin but did receive sums of money and gifts from Dr. Forte and that most of the money and gifts were delivered to Mrs. Smith.

SUMMARY OF THE ARGUMENT

When a count charging another offense has been withdrawn from the jury's consideration and it is read to the jury by the trial judge, a mistrial is necessary to prevent prejudice to the defendants. When the error is on the part of the trial judge and he refuses to correct it sua sponte, there can then be no doubt of the prejudice.

It is uniformly recognized that a reasonable doubt may arise not only from the evidence in the case but also from lack of evidence and the failure to grant such an instruction upon request is fatal. When an important issue of fact is litigated by a court of coordinate jurisdiction, that issue is settled in any future litigation involving the same parties.

When as a result of misconduct on the part of prosecuting and police officers a grand jury is biased against a defendant, then the indictment should be dismissed.

Whether a witness who has been placed in fear of a possible indictment and is questioned repeatedly by prosecuting officers and is forced against her will to arrange certain telephone recordings which are in violation of law such coercion then raised a constitutional issue and such witness should not have been permitted to testify.

The conviction should be set aside inasmuch as the record shows that the prosecuting officials in preparing the indictment and planning for trial violated certain criminal statutes.

When government officials arrange a recording involving two government witnesses and the government has the benefit of the contents of such recording in preparing for the trial and the defendants are denied the use of said recording, then there is a violation of the Jencks Act.

Our public policy will not countenance the tactics used by the prosecuting and police officers in bringing about the indictment in this case and in the trial preparation.

In the bringing of the indictment and in the preparation for trial and in the trial itself, there was a lack of fundamental fairness to the extent that the constitutional rights of the defendants were violated.

It is not permissible to receive in evidence the testimony of a coconspirator until the conspiracy itself has been established.

When there is evidence in the record to support it the court must charge on the defendant's theory of the case.

When there is a witness peculiarly available to the government and not the type of witness that the defense would be expected to call the defense is entitled to an instruction as to the inference to be drawn and in any event the defense is entitled to argue such matter.

When there is a prior conviction of long standing the court in its quest for truth should prevent the prosecuting attorney from impeaching defendant by the use of such conviction.

When the complaining witness, already thoroughly discredited, testifies as to a certain bribe the defense is entitled to know the source of such bribe.

In a charge of conspiracy the jury should not be left in doubt as to the applicable law available.

In the present tendency toward more liberal discovery the appellants should have been given access to the entire grand jury minutes.

ARGUMENT

READING OF A WITHDRAWN COUNT TO THE JURY

We have set forth in the appendix the situation as it existed when the motion for mistrial was made. This has been made a part of the record by the government. (See page 5 of government's opposition to motion for new trial.) To make this point more understandable it is well to set forth some of the background. APP. 13-14.

The indictment in this case charged in Count One a conspiracy as to both appellants. Paragraph 6 of Count One recited the following:

"6. That it was also part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting, and having reason to know well, believe, and expect that one Dorothy Lee Birge would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No 741-61, to testify with respect to the matters set forth above in paragraph 3, including sub-paragraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting, and persuading her to testify falsely to the aforesaid matters at said proceedings and trial."

Sub-paragraphs a, b, and c referred to above consisted of the following:

- "a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- "b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and
- "c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in sub-paragraph b above."

The count as to Birge was withdrawn and was not a part of the proceedings. We wish to emphasize that Birge was called as a witness, not as to paragraph 6 but as to paragraph 5, which reads as follows:

"5. That it was part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial, and, if she did not absent herself, then, to testify falsely to the aforesaid matters at said proceedings and trial."

She was permitted to testify as to the Smith count, not as to the Birge count. Her testimony was in effect that the defendant and Forte had called her on the telephone and offered to return to her the money allegedly paid by her to Forte. In no part of her testimony did she involve the appellant Laughlin. In fact, she was emphatic in saying she had no contact whatsoever with the appellant Laughlin.

The trial judge in his instructions to the jury read the indictment to the jury and in reading the indictment, he read paragraph 6 as referred to above. Of course, paragraph 6 related to another offense. It should not have been read to the jury. Of course, it is wholly improper while a trial judge is instructing a jury to interrupt the trial judge. As

soon as the trial judge completed the charge to the jury, counsel, as the rules require, approached the bench and Mr. Garber, representing the appellant Forte, called the attention of the trial judge to the fact that he had read to the jury the paragraph relating to Birge which had been withdrawn. The trial judge recognized that it should not have been read to the jury. We believe this can be best set forth to this Court if we refer to the Government's opposition to the motion for new trial where at pages 5 and 6 the United States Attorney sets this forth in detail as follows:

(Also see transcript 2340-2342)

"MR. GARBER: Your Honor, during the course of the instructions Your Honor was reading from the indictment and, as I recall, Your Honor read paragraph 6 on page 2.

"THE COURT: Yes.

"MR. GARBER: That referred to Birge.

"THE COURT: Yes.

"MR. GARBER: And that material was stricken out.

"THE COURT: It was not out of the copy I received, was it?

"MR. GARBER: Well, actually this referred to Count 3, which was dismissed.

"THE COURT: Do you want me to clarify it?

"MR. GARBER: I feel at this point that to call the jury's attention to it would compound the effect that the reading of this might have. Therefore, on the basis of the Court's reading paragraph 6 of count 1 of this indictment, referring to Birge and not referring to Smith, I would move for a mistrial.

"THE COURT: You don't want me to make any explanation?

"MR. GARBER: Your Honor, I feel if you made an explanation it would only compound what has already been done.

"THE COURT: So therefore I understand you do not want me to make an explanation?

"MR. GARBER: I would not ask for an explanation.

"THE COURT: Mr. Laughlin, do you join in that?

"MR. LAUGHLIN: I join in that point, and I agree with that. It would be prejudicial as far as both defendants are concerned.

"THE COURT: Mr. Lowther?

"MR. LOWTHER: There is no grounds for mistrial here, sir.

"THE COURT: I deny the motion for mistrial. As I understand, both counsel do not want any explanation made of paragraph 6, and I will not make any. You don't want any explanation made either, of paragraph 6, Mr. Lowther?

"MR. LOWTHER: No, sir."

The United States Attorney takes the position that since the appellants did not acquiesce in the suggestion of the trial judge that the matter be clarified, that it amounted to harmless error. The position of the appellants was to the effect that the harm had been done and that no cautionary instruction would have been effective. Our view is that the error was the error of the trial judge and there was a duty on the part of the trial judge to correct the error, insofar as he could. We are unable

to understand why the Assistant United States Attorney did not suggest that a cautionary instruction be given. However, appellant in this case takes the position that a cautionary instruction would not have cured the error. It was particularly damaging to the appellant Laughlin because the witness Birge, testifying on the Smith count, stated that she had no contact whatsoever with the appellant Laughlin. Therefore, when the trial judge in instructing the jury read to the jury:

"That it was also part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting, and having reason to know well, believe, and expect that one Dorothy Lee Birge would be a material witness \* \* \* the said defendants and co-conspirators would and did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting, and persuading her to testify falsely to the aforesaid matters at said proceedings and trial."

the prejudicial error is apparent. We of course contend that it was also prejudicial to the appellant Forte.

The following from People v. Mack, 17 Calif. Reporter 425, is helpful here:

"The court feels that it was substantial error to read a non-existent information because by its amendment it had been completely eliminated. It was not the duty of the defendant to recognize the difference between the original information and the amended information. It was the duty of the Clerk to read the right information and further it was the duty of the Court and likewise the duty of the District Attorney to see that the right information was read and in particular where the defendant was not represented by counsel. The errors could have been cured had the officers of the Court been paying strict attention to the charge. \* \* \* Even the public and our

citizenry are entitled to expect that our Court read the correct complaint or information. This is a vital part of the judicial process of the United States form of Government."

A more recent expression on this subject is found in United States v. Gorman, 355 Fed(2nd), 151 CCA 2 (1965). Even in the Gorman case the trial judge on his own motion made a correction. The Court of Appeals said that a mistrial should have been declared but due to the nature of the evidence against the accused the Court would not reverse.

We contend in this case even though the trial judge attempted to correct his own error, the harm could not be erased. We believe the following from a very recent case correctly states the legal principle involved. In Lawrence v. United States, 357 Fed(2nd), 434 CCA 10 (March 11, 1966), the Court said:

"Evidence which improperly finds its way into a trial may be excluded without harmful effect upon a defendant by the act of the trial court in striking the testimony coupled with an admonition to the jury to disregard it. (Holt v. United States, 94 Fed(2nd) 90; Maestas v. United States, 341 Fed(2nd) 493). There are however circumstances where such action by the trial court is not considered to be sufficiently effective to render the error harmless. This would include instances where the effect of the evidence is so strong despite an admonition to disregard it that it would be necessary to interfere with the jury's impartial consideration of the other evidence properly admitted."

See United States v. Jacangelo, 281 Fed(2nd) 574; and Marshall v. United States, 79 Sup. Ct. 1171.

Of course, no amount of cautionary instructions could have cured this error. We believe that the following from Sumrall v. United States, 360 Fed(2nd) 311--CCA10, May 9, 1966, is important here. The 10th Circuit disregarded completely the matter of evidence. In fact, the first sentence of the opinion in the Sumrall case said this:

"The evidence of guilt is overwhelming."

That case had to do with reception in evidence of certain police records. The government contended that while it was improper in that it was harmless error and the Court should keep in mind that the evidence of guilt was very, very strong. The Court said:

"It may also well be that any comment or reference to the 'records' would have served to over-emphasize the fact in the minds of lay jurors."

And the Court continued:

"But the defense not the prosecution or court must be the judge of the probable impact of the reference to appellant's records."

The Tenth Circuit in the Sumrall case, supra, said this in conclusion:

"We are of course loathe to reverse a case like this in the face of overwhelming evidence of guilt. Technical niceties such as these make the law appear ridiculous to the man on the street. But 'All law is technical if viewed only from concern for punishing crime without heeding the mode by which it is accomplished.' I.e., see Mr. Justice Frankfurter in Bollenbach v. United States, 326 U.S. 607. In circumstances like these the question is not whether the appellants have been proven guilty but whether guilt has been established according to the procedural safeguards to insure trial

before a fair and unprejudiced jury. It is not enough to be able to say that the evidence is entirely sufficient to convict without reference to prior records of appellants and that the jury would have in all probability returned a verdict of guilty without such knowledge. The question we must decide is whether the jury was more prone to convict these appellants knowing they had previous records than without such knowledge. In other words can we say with reasonable certainty that the reference to prior records 'had but very slight effect on the verdict of the jury'? We cannot say so and the cases must therefore be reversed."

REFUSAL TO INSTRUCT THAT A REASONABLE  
DOUBT MAY ARISE FROM A LACK OF EVIDENCE

This point also can be determined without the transcript.

The record reflects that an instruction was tendered and refused.

It is almost uniformly recognized in our system of jurisprudence that a reasonable doubt can arise not only from the evidence introduced but it can arise from a lack of evidence. The following instruction was requested by the appellant:

(Defendant's Prayer 29, Transcript.)

"You are instructed that a reasonable doubt may arise from the evidence in the case and you are also instructed that a reasonable doubt may arise from lack of evidence."

This tendered instruction was refused.

In State v. Walker, 166 A.2d 567, Supreme Court of New Jersey (1960), the Court said:

"It is next contended that the trial judge erred in refusing to charge the jury as requested that 'a reasonable doubt may arise from the lack or want of evidence.' In a criminal case the State has the obligation to prove every element of the offense charged beyond a reasonable doubt. A reasonable doubt may be engendered from the evidence introduced by the State or the defendant. It may also arise from the failure of the State to produce the essential proof. \* \* \* This court has held that when a trial judge is requested he must instruct the jury that a reasonable doubt may be engendered by a lack of evidence. State v. de Paola, 5 N.J. 1, 9 (1950). It is not necessary for the trial court to instruct the jury in the exact language of the request so long as he does not confine the source of reasonable doubt to the evidence presented. But nowhere in his charge did the trial judge in the present case say or imply that reasonable doubt might arise from want of proof. He did charge

that the defendant was presumed to be innocent and that the State had the burden of proving every material element of the crime beyond a reasonable doubt. When however he defined reasonable doubt he twice stated that such doubt must arise from 'an entire comparison and consideration of all the evidence.' In view of State v. de Paola we do not think that a reasonable doubt growing out of 'all the evidence' satisfied a request to charge that such doubt may arise out of a lack of evidence as well. Thus the trial judge ignored the principle that a reasonable doubt may properly arise out of lack of evidence upon some issue in the case and therefore the refusal to charge as requested was reversible error."

In Bishop v. United States, 71 App. DC 132, this Court said:

"Reasonable doubt is a doubt arising from the evidence or from a lack of evidence, after consideration of all the evidence."

This was approved by the Supreme Court in Holland v. United States, 348 US 121.

State v. King, 4 NW 2d 244, Supreme Court of Iowa (1942), is helpful here. In that case the defendant requested that an instruction be given that a reasonable doubt might arise from the lack of evidence and the Court said:

"The matter of the failure of the trial court to include in its instructions that a reasonable doubt as to the guilt of the defendant may arise from a lack of evidence, has troubled this court on many occasions, and there is some lack of harmony among its decisions on this question. Uniformly the court has held that the jury should be instructed that a reasonable doubt may arise not only from the evidence introduced, but from a lack of evidence. Where the element of lack of evidence has not been thus mentioned, the court has on several occasions criticized and disapproved the instruction, and has cautioned trial courts against such omissions."

The Court then went on to say:

"In some decisions, however, the court reversed or strongly intimated that the failure to include the element of lack of evidence in an instruction on reasonable doubt, was reversible error. See State v. Smith, 192 Iowa 218, 237, 180 NW 4 \* \* \*. And in State v. Anderson, 209 Iowa 510, 514, 228 NW 353, 67 A.L.R. 1366, by a five to four decision, the court held definitely that the failure to instruct the jury that a reasonable doubt of guilt might be based on lack of evidence was reversible error."

Continuing, the Court said:

"This decision has since been followed in State v. Love, 210 Iowa 741, 231 NW 392 \* \* \* \*." (Many other cases were cited.)

The requirement as to the necessity of instructing on this phase of the law is well recognized when reference is made to the work of Judge Mathes and Judge Devitt, Federal Jury Practice and Instructions. At page 83 we find:

"A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence."

This is the latest work on the uniformity of instructions in the Federal courts and it is apparent that it was prepared with great care, as the foreword of the Honorable Sylvester J. Ryan, Chief Judge, United States District Court for the Southern District of New York, attests.

Therefore, we say that the failure to grant the instruction requested was reversible error.

THE ADMISSION IN EVIDENCE OF THE  
TELEPHONE RECORDS WAS ERROR

There was received in evidence record reflecting telephone calls allegedly made by the witness Gross and the appellant Laughlin. Objection was made to the reception of this evidence on the ground of collateral estoppel. Judge Curran's opinion, 226 Fed. Supp. 112, having before him the matter of telephone calls in United States v. Laughlin, recited this:

"These records prove only one thing, if they prove anything at all, and that is, telephone calls were made between certain phone numbers. To argue from a phone company record showing a call between certain phone numbers that the persons whose names those phones are listed made the call is destructive of a very important rule of evidence; namely, that the person making the entry (in this case the telephone operator) should be making the entry based on personal knowledge. This principle has often been invoked in excluding entries made by a person who had no personal knowledge of the supposed facts recorded. (It hardly need be pointed out that this same rule applies with equal force to a person-to-person call, as there the operator has no personal knowledge of the real parties making the call, but only records the names given to her.)" APP. 16-18.

Judge Curran said further:

"With regard to the telephone company bills it should be noted that because the person in whose name the telephone is listed pays the bills for calls billed to his listing, it is no proof whatsoever that certain of those calls were made by him personally, as any of several people may have permission to use his telephone and this is especially true in the case of a business phone."

We contend that Judge Curran having ruled on this matter, and having in mind that the Government noted an appeal from his ruling

and later abandoned the appeal, the doctrine of collateral estoppel would apply. In Laughlin v. United States, 120 US App. DC 93, 344 Fed(2d) 187, this Court said:

"The doctrine of collateral estoppel, developed largely in the context of civil litigation, is designed to prevent repetitious litigation of the same issue by the same parties. It applies generally to preclude relitigation of an issue resolved by final judgment in a prior legal action."

It is of course understood that collateral estoppel applies in criminal cases as well as civil.

This Court had occasion to again pass upon the matter of collateral estoppel in Moore v. United States, 120 US App. DC 173. This Court said:

"To invoke that doctrine, however, a party must show that an important issue of fact has been previously litigated by the same parties and resolved by final judgment in the prior litigation."

There is no question that the government asked Judge Curran to pass upon the admissibility of the telephone records and the matter was accordingly litigated. The government was not satisfied with the final judgment of Judge Curran and noted an appeal but later dismissed the appeal. The Court in reference to Judge Curran's decision said in Laughlin v. United States, 120 US App. DC 93:

"Since the government had the right to appeal . . . it was duty bound to proceed accordingly or become subject to the doctrine of collateral estoppel. In fact, the government did note an appeal, but it was later dismissed on the government's own motion."

See Reinstatement, Judgment Sec. 68 (1942).

With respect to the matter of collateral estoppel or res judicata in criminal cases, the following from United States v. Carlisi, 32 Fed. Supp. 479, correctly and succinctly states the principles involved:

"It would indeed be a said commentary on justice if a Court should permit the prosecution to prove facts excluded by a court of coordinate jurisdiction where the same defendant is charged with a crime."

The Court in Carlisi quoted from the New York Law Journal December 18, 19, 20, 1939, outlining the history of res judicata and collateral estoppel.

There is a good treatise on this matter found in 28 University of Chicago Law Review beginning at page 145. There was cited United States v. DeAngelo, 138 Fed(2d) 466 which held that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction, whether in a criminal or a civil case, cannot afterwards be disputed between the same parties.

It must not be overlooked that the government put the matter in issue and it was determined adversely to the government.

A very recent expression on the matter of collateral estoppel is found in State v. Cormier, 218 Atlantic(2) 138. The Court said:

"The doctrine of collateral estoppel should not be applied grudgingly. The State's resources are sufficient to enable it to prepare and present its case thoroughly. It did that during the first trial. The fact that it then failed to persuade the jury that the loans were made on the basis of false and fictitious invoices rather than bona fide purchase orders was no reason for allowing it to try again. The broadening policy considerations in favor of safeguarding

individual rights of defendants and the need for conserving public funds, strongly suggest that where, as here, a jury has considered and rejected the State's contention in favor of the defendants' contention on the issue submitted as the crucial one, the matter should be permitted to rest in its entirety."

*to discuss  
issue -  
act*

We desire to point out again that to invoke the doctrine of collateral estoppel it must be shown that an important issue of fact had been previously litigated by the same parties and resolved by final judgment in a prior litigation. Much has been written on this subject. We believe, however, one of the most convincing works on the matter of collateral estoppel is found in 4 Houston Law Review, 73 Spring-Summer, 1966. There is set forth the following:

"Collateral estoppel to be pleaded must embrace the following:

1. Actions involving the same questions of law arising from the same transaction or subject matter.
2. Actions involving mixed questions of law as well as pure questions of law.
3. Actions in areas in which there has been no changes in the legal climate.
4. Actions in which the application will not result in injustice.

A change in the legal climate between two actions may arise from two situations: (1) If the change is due to legislation or a regulation, the change is controlling and collateral estoppel will not be applied; and, (2) if the change is due to a judicial proceeding subsequent to the first action, the first proceeding usually will still be deemed conclusive."

BIAS OF THE GRAND JURY

There is as a part of the record in this case various transcripts of grand jury proceedings. In addition there is included the proceedings in the courtroom of Judge Youngdahl and Judge Hart. The pertinent portions are referred to in the appendix. APP. 19-40.

We are not unmindful of the Supreme Court opinion in Costello v. United States, 350 US 359. However, one sentence in that opinion is often lost sight of. That is the language of Justice Black where he said:

"An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." (Underlining ours.)

In the instant case the Grand Jury would naturally be biased against the defendants--particularly the defendant Laughlin--by the mere playing of the unlawful recordings. These recordings were not only played before the Grand Jury on more than one occasion but the contents of the recordings were stressed time and again before the Grand Jury. The playing of the recordings adds a conspiratorial air to the whole proceedings. In other words, it gives the impression there is something sinister and bizarre. This should be given more emphasis due to the fact that the Court of Appeals found that the recordings were made in violation of the Federal Communications Act--in fact constituted a crime. See Laughlin v. United States, 344 Fed(2nd) 187.

In addition to the above there was read to the Grand Jury the proceedings in Hannon's office. Of course these were unlawful and by the overwhelming weight of authorities the will of the witness Gross was overcome and the statements she made during this period of interrogation were by all theories of evidence involuntary. Of course after hearing the recordings and after having read to them and stressed to them the illegal proceedings in Mr. Hannon's office, one would have to assume that the Grand Jury could not be free from bias. While Gross was being interrogated in Mr. Hannon's office, Sullivan said to her (page 60): (See proceedings Mr. Hannon's office, March 1, 1963)

"MR. SULLIVAN: A lot of things can be done in the phone conversation. Mrs. Gross can say, look, I told them the whole truth today. He can hang up or he can talk to her. Or Mrs. Gross can say, they had me in there three hours, I'm looking bad because they know I know something; say, I took the Fifth Amendment it must have been about 250 times."

And then Mr. Hannon said:

"MR. HANNON: She will cooperate, I'm sure, whatever we want." (Underlining ours.)

After Gross had finished the ordeal in Mr. Hannon's office, there was a question about an oath being administered to her to give validity to the proceedings and at page 64 we find this:

"MR. HANNON: Why don't you just take her in the Grand Jury and let her swear to the Grand Jury that everything she said was true, so help her God?

"MR. SULLIVAN: That's true, too. We don't have to use my oath in here.

"MRS. GROSS: Do you have to do that again?

"MR. SULLIVAN: We may have to do it just so the Grand Jury may want to ask questions too. Suppose we do this?"

We believe the concurring opinion of Justice Burton in the Costello case is pertinent here. He said:

"I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment."

As a further instance of bias the transcript involving investigation of Joyce Johnson (a part of the record in this case) will reflect that the recordings ruled unlawful by this Court (recordings between Mrs. Gross and appellant Laughlin) were again played before the Grand Jury. Of course these had no part in any investigation of Joyce Johnson and could only have the effect of influencing the Grand Jury against appellant Laughlin.

In connection with this point we also desire to point out that as a result of certain matters taking place before the Grand Jury on March 26, 1963 (a part of the record in this case) the deputy foreman said: (See testimony, Samuel E. Wallace before Grand Jury 3-26-63, pp. 28-30.)

"Mr. Laughlin seems to be throwing around an awful lot of accusations."

and on the same day the deputy foreman made this statement:

". . . I think this grand jury wants to hold this testimony on a little higher standard than Jim Laughlin's concept of trying a law case."

This is of course significant because the deputy foreman did not know appellant Laughlin. There is a part of the record in this cause the proceedings in Judge Youngdahl's Court (Criminal 599-63). It is interesting to note that with respect to this same deputy foreman Judge Youngdahl stated on two occasions that he was "shocked" when he read in the Grand Jury transcript (March 1, 1963) this statement by the deputy foreman:

"Mr. Sullivan, I would like to say this and I think I speak for the grand jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we can. I think you can tell this witness and any other witness, in or out of this room, that we'll get after him. We prefer the big ones but if they make it impossible for us to get the big ones, we'll get the little ones." (Page 7, Testimony, Mrs. Gross.)

At the same time Mr. Sullivan made this reply:

"Thank you Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the grand jury and let me suggest a program of operation to you."

We believe the old case of United States v. Farrington, 5 Federal 343, is in point as well as the case of United States v. Digrazia, 213 Fed. Supp. 232.

Justice Burton's concurring opinion in Costello v. United States, supra, is worth repeating:

"I assume this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed."

In United States v. Farrington, supra, the Court said:

"It would be difficult to find a case which more forcibly illustrates the good sense and justice of the rule which permits a free disclosure than the present. It is patent that the grand jury permitted themselves to be influenced by the appeals and arguments of a zealous advocate, by hearsay testimony, and by testimony which the law prohibits, although they were advised to the contrary by the district attorney; and it seems much more probable that they were led to their conclusions by prejudice and undue zeal than by calm and fair deliberation. If there was evidence which authorized an indictment, it was so blended with and obscured by the mass of hearsay and otherwise incompetent testimony that it was impossible for the jury to distinguish it; and it would be expecting too much of a body, untrained in judicial investigation, to believe that they could discriminate intelligently between the competent and the incompetent evidence, so as to accord due weight to the former and be uninfluenced by the latter."

As a further instance of the attempt to inflame the grand jury and to bolster our contention as to the applicability of the fruits doctrine, we desire to state that there is a part of the record of this case the testimony of Joyce Johnson. This was the same Grand Jury bringing the indictment in the instant case. At page 96 the following occurred:

"P R O C E E D I N G S

"(The Grand Jury reconvened at 2:30 o'clock p.m.)

"MR. SULLIVAN: While we are waiting for the witness, Mrs. Johnson, I will play this tape of the telephone conversation.

"(At this point in the proceedings a tape of a telephone conversation between Bernice Gross and James J. Laughlin was played before the Grand Jury.)

"MR. SULLIVAN: Now ladies and gentlemen of the Jury, you have just heard the tape which Mrs. Gross

has told me outside of the Grand Jury that she made today with Mr. Laughlin, James J. Laughlin, the attorney. Now I know that the setup for this tape recording was here in the United States Court in Washington on this EKO Tape Machine, and that it was made in the presence of members of the police force of Washington here with Mrs. Gross's consent when she called Laughlin's number here in Washington.

"Now you will note that in that conversation you just heard, there was some reference made to the question did Gross and Smith and Laughlin meet at his office. If you recall, that question was asked specifically of Laughlin the other day when he was before this Grand Jury.

"Now as I indicated to you then by way of introduction, maybe I didn't do it specifically enough. Let me emphasize it now. That there is absolutely no evidence that Laughlin, Gross, and Smith met in his office. That didn't happen as far as we know. Just like Laughlin said, It didn't happen. But I would suppose that having asked that question, Mr. Laughlin, if he had something to hide, would suppose that we didn't know what the real truth was and that we were bluffing. That we were fishing in the dark when the question was asked of him emphatically, isn't a fact that you and Gross and Smith met in your office.

"So if he did have something to hide, and if he did think we were bluffing about how much we knew about the truth, perhaps that's the reason he came forward then and made the other statements he did.

"But I wanted the record to be clear and each individual to know that we are not saying that those three met here in Washington at the National Press Building."

\* \* \*

By way of explanation it should be pointed out that there was an investigation of activities of Joyce Johnson not otherwise connected with the appellant Laughlin and it is obvious that the unlawful tape recording was played for a sinister purpose.

Another instance of the successful effort to inflame the Grand Jury will be seen in the Grand Jury proceedings of March 26, 1963, with Gross testifying. This occurred:

"Deputy Foreman. Now we have evidence here that Forte, and I am not going to call him a doctor, he's not a doctor--that Forte was bribing people to get their testimony changed or refrain from giving testimony. Now are you trying to create the impression with us that Forte's doing all this; that Jim Laughlin, is a perfectly innocent naive somebody that doesn't know anything about this?"

The Deputy Foreman did not know either appellant. By what right did he say that Forte was not a doctor. He does have a doctor's degree. All of this of course was convincing evidence that the Grand Jury was without doubt biased. (See p. 153, Testimony, Gross before Grand Jury, March 18, 1963.)

FRUIT OF THE POISONOUS TREE

In Wong Sun v. United States, 308 United States 338, the Supreme Court dealt at some length on the principal of law referred to as "fruit of the poisonous tree." The Court said:

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police, rather the more apt question in such a case is 'whether granting establishment of the primary illegality the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Citing Maguire, Evidence of Guilt, 221 (1959)."

We contend that this prosecution began with the unlawful recordings. In addition to the recordings we contend that the matter of coercion of Mrs. Gross and the questionable activities of the officers of the government must be taken into consideration. We believe taking the picture in its entirety the evidence was without doubt "fruit of the poisonous tree." See United States v. Avila, 227 Fed. Supp. 3. Laughlin v. United States, 120 US App. DC 93, APP. 41.

It is our contention that the unlawful recordings gave rise to this case. We also contend that the testimony of Mrs. Gross was coerced. The Grand Jury proceedings, a part of the record in this case, will show this coercion. On March 1, 1963, the witness Gross was before the Grand Jury on two occasions. On the first appearance she gave testimony not satisfactory to the Assistant United States Attorney and was interrogated for some 2 or 3 hours. She was reminded that she had committed perjury

and was in danger of an indictment. All of these transcripts are before the Court as a part of the record in this case. We say that the testimony that Mrs. Gross gave before the Grand Jury was, in fact, "fruit of the poisonous tree". There had been several recorded telephone conversations between Gross and the appellant Laughlin. As has already been stated, these recordings were obtained in violation of the law. We contend that all of the information leading to the indictment in this case came as a result of the unlawful recordings and was as a result of the coercion of Mrs. Gross in the office of the Assistant United States Attorney. We believe one of the first expressions as to the fruit of the poisonous tree is found in the words of Justice Frankfurter in Nardone v. United States, 308 U.S. 338; 60 S. Ct. 266:

"The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established--as was plainly done here--the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."

This matter is explored very fully in Wong Sun v. United States: A Study In Faith And Hope, 42 Nebraska Law Review beginning at page 483 and suggest particular application to pages 516-530. A careful reading of the record will show that the taint was not dissipated as we find in McGuire, Evidence of Guilt, 221. The question is simply this: "whether granting establishment of the primary illegality the evidence to which the

instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

VIOLATION OF CRIMINAL STATUTES BY THE GOVERNMENT

There is made a part of the record in this cause the transcripts reflecting a prior trial involving these appellants. On this point we will make appropriate references to these transcripts.

The original indictments were returned on July 2, 1963. On July 12, 1963 there was a recorded conversation over the telephone between Mr. Sullivan in Washington and Mrs. Gross in Baltimore. In that conversation Mr. Sullivan was advising Mrs. Gross how Mrs. Smith (who had admitted receiving money from Mrs. Gross) how it should be treated on her income tax return:

"MR. SULLIVAN: I don't know how she considered it or how she would consider it on reflection. She might not consider it a gift or maybe wouldn't consider it an income . . . way you get money like that, don't talk about it, as a rule, but just a question to be aware of what might possibly come.

"MRS. GROSS: Why, if Forte deducted it.

"MR. SULLIVAN: That is true too. He didn't. No, I checked."

Pages 447, 448 Proceedings April 21, 1964, Criminal No. 600-63.

This, of course, is a violation of the Internal Revenue Code. Section 7213(a) of the Internal Revenue Code prevents disclosure and in fact imposes a penalty of imprisonment. We have always understood that only the President can permit such inquiry. It was evident in this case that Mr. Sullivan was guiding Mrs. Gross in her future testimony. APP. 46-48.

Appellant Laughlin testified before the Grand Jury on March 6, 1963. Within a few hours there was a recorded telephone conversation between Mr. Sullivan in Washington and Mrs. Gross wherein in violation of law Mr. Sullivan revealed Grand Jury testimony.

"MR. SULLIVAN: I expect that there's at least a possibility that Laughlin might call you tonight.

. . . . .

"MR. SULLIVAN: Well, he may possibly call because he's before the Grand Jury today.

"MRS. GROSS: He was.

"MR. SULLIVAN: And he doesn't know any Bernice Gross."\*

And to show that there was a clear purpose to reveal Grand Jury testimony (since there was no other way in which Mrs. Gross knew what had taken place before the Grand Jury) we find this:

"MR. SULLIVAN: . . . so I assumed he was trying to camouflage to the grand jury . . . I did say this to him so he would think that I was trying to bluff him. I said 'if I told you Jean Smith that Bernice Gross and Jean Smith and you met this week in the National Press Building, what would you say about that?' and he said 'Oh, that is a terrible lie.' So he assumed then that I was bluffing."

and continuing to reveal grand jury testimony:

"MR. SULLIVAN: . . . I also bore down on Lorraine and I said you know . . . if I told you that Bernice said that Lorraine knew Bernice Gross and so on and so on . . . "\*\*

\* Page 386, Proceedings April 21, 1964 Criminal No. 600-63.  
\*\* Page 392, " " " " " " "

Of course, revealing Grand Jury testimony is a violation of Rule 6(e) Federal Rules of Criminal Procedure. This rule, which has the force of statutory law is quite specific on this point. We desire to emphasize that the Grand Jury was still in session and had returned no indictment. Since Mrs. Gross was to appear on other occasions before the Grand Jury Mr. Sullivan was anxious to make known to her the testimony of another witness, Lorraine Burrell, who formerly worked with Mrs. Gross on the police force in Baltimore. APP. 48-49.

There were some six recorded telephone conversations between Mrs. Gross and defendant. Of course, it has already been determined that these recordings were in violation of law (120 US App. DC 93). Not only is it against the law to intercept and divulge but a violation also carries with it a prison term. Section 605, Title 47, United States Code relates to unlawful recording and Section 501, Title 47, United States Code prevents unlawful recordings and provides a penalty for violation. APP. 50-51.

COERCION OF MRS. GROSS

It is our contention that the testimony of Mrs. Gross should not have been received in evidence. We well realize that ordinarily a contention of this kind rests on the matter of credibility. However there are instances, in our judgment, when it becomes a constitutional question. This matter has not, insofar as we know, ever been decided by the Supreme Court or any of the lower federal courts. The Supreme Court in Turner v. Pennsylvania, 338 United States 62 (1948), recognized the problem without deciding it. Justice Frankfurter said:

" . . . If these confessions were introduced into evidence at the retrial of Turner 'there would then arise the question whether under the Fourteenth Amendment a coerced statement may be excluded on objection of one not coerced into making it. '"

There is an interesting discussion on this matter in 57 Northwestern University Law Review 549. The author says:

" . . . Yet one facet of these guarantees strongly bearing on the protection of personal liberty, has not received adequate treatment by the courts: has the accused the right to object to testimony offered against him, when that testimony is obtained through methods which would vitiate his conviction, had they been employed against him? Stated more explicitly, has the accused the right to object to testimony offered against him which is obtained from witnesses by coercion? "

In the instant case the transcripts (part of the record in this case) show that Mrs. Gross was before the Grand Jury and made answers not satisfactory to the United States Attorney. She was then taken to the

office of the United States Attorney and without benefit of counsel interrogated for two and one-half hours. She was then taken back before the Grand Jury. She was then taken to the office of the United States Attorney and certain telephone recordings were made against her will. As we have stated these recordings have been held unlawful by this Court. (120 US App. DC 93.) She then made three more appearances before the Grand Jury. In addition there were visits without number to the office of the United States Attorney. There is a part of the record in this case a great number of telephone slips showing telephone calls between Mr. Sullivan and Mrs. Gross. In addition there were a great number of telephone recordings between Mr. Sullivan and Mrs. Gross and many of them without the consent of Mrs. Gross. In addition there was a recording arranged by Mr. Sullivan in Mrs. Gross' home between Officer Samuel E. Wallace and Mrs. Gross without the consent of either.

It is our view that in the light of the above the testimony of Mrs. Gross is beyond the area of credibility and reaches the dignity of due process. (See testimony, Mrs. Gross before Grand Jury and in office of Mr. Hannon, March 1, 1963. APP. 23-38.)

VIOLATION OF THE JENCKS ACT

In deciding this point the Court has as part of the record in this cause the pertinent transcripts. We will make appropriate references and have included certain matter in the appendix.

Mr. Sullivan, Assistant United States Attorney, visited Mrs. Gross at her home in Baltimore and brought with him certain recording equipment. He arranged a telephone recording between Mrs. Gross and Officer Wallace. The transcript, April 21, 1964, Criminal No. 600-63, pages 364 to 378, contains the contents of these recordings. We desire to point out that neither Officer Wallace nor Mrs. Gross consented to the recordings. We also desire to point out that both Officer Wallace and Mrs. Gross refused to divulge the contents of these recordings. Here are a few excerpts:

"GROSS: Why in the hell they do that with Jean Smith?"

"GROSS: Did you know I was in on it before?"

"GROSS: Sullivan dreamed it up."

"GROSS: I don't trust any of them--none of you."

"GROSS: You're better keeping your nose out of it."

"GROSS: He's a lot of crap."

"GROSS to WALLACE: Listen, are they on to you at all?"

"GROSS: I am sitting here on a keg of dynamite."

The officers of the government had the benefit of these recordings and used the contents in the trial preparation since the manner in

which they were obtained was in violation of the law the defense could not utilize the contents. It is our view that under the Jencks Act we are entitled to the use of the contents or otherwise the testimony of Mrs. Gross should have been stricken. Since the recordings were made in violation of law, another constitutional question arises.

### PUBLIC POLICY

It is our view that the methods pursued by the government officers in this case offend our public policy. We believe the following instances showing disregard of the rights of an accused should not be countenanced:

1. After a witness testified before a Grand Jury and makes answers not satisfactory to the United States Attorney, should that witness be required to go to the office of the United States Attorney for interrogation or rather "brainwashing."
2. After a witness has admitted many acts of perjury and is constantly reminded that she has committed perjury and is in danger of indictment, should such a witness be a pawn in the hands of government officials.
3. Should such a witness be permitted to appear on other occasions to "correct" her testimony and other witnesses are not accorded such an opportunity.
4. Should such a witness be permitted to call the United States Attorney at all hours of the day and night at the expense of the United States.
5. Should such a witness be required to engage in recorded telephone conversations against her will.
6. Should such a witness be required to engage in recorded telephone conversations with others against her will.

There are other--and many--instances reflecting violations of personal liberty which in our judgment offend our public policy.

That brings up the question: What is Public Policy? There is a very interesting treatise on this matter in 21 Phillippine Law Review

158. The matter of public policy arises in the law of contracts in most instances. We believe that the following from a very recent case is helpful. We refer to In re Barnes' Estate, 128 NW(2) 188, 192. We find:

"Term 'public policy' recognizes principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law."

In our judgment, this has application in the field of criminal law. In the early case of United States v. Whittier, 28 Federal Cases 591, the Court said:

". . . Resort to unlawful means is not to be encouraged."

In 10 New York University Law Quarterly 535, in commenting on Sorrells v. United States, 287 US 435 we find:

"The foundation of the doctrine seems to be that a sound public policy requires that the government come into court with clean hands."

In 13 Boston University Law Review 297, we find:

"Is it a question of interpreting legislative intent or sound public policy. The writer approves of the views of the dissenting opinion which is also in accord with the previous great weight of authority in the lower federal courts."

and then there was a quote from Sorrells:

"The doctrine rests, rather on a fundamental rule of public policy."

LACK OF FUNDAMENTAL FAIRNESS

We believe a review of the entire proceedings in this case will without doubt lead to the conclusion that fundamental fairness was lacking. Of course, to prevail on this point it is necessary in order to make out a case of denial of due process that the tactics employed by government officers "fatally infected the trial and the acts complained of must be of such quality as necessarily prevent a fair trial." Kuykendall v. Hunter, 187 Fed(2nd) 545.

In the instant case the statement was made by the Assistant United States Attorney that there would be a full scale inquiry into the matter of obstruction of justice. Included in that investigation was the testimony under oath by Dr. Forte that one Samuel E. Wallace had solicited a bribe. Therefore all were led to believe that it would be a bona fide investigation. However, there was then a concerted effort to protect Officer Wallace. In fact he was permitted to investigate himself. He was permitted to assist Mr. Sullivan and interview witnesses. Although he was a target of the investigation here at no time was he warned of his constitutional rights although other witnesses were so warned. Perhaps the most flagrant instance is shown when he was permitted to go before the Grand Jury on March 26, 1963. This was a vehicle used to inflame the Grand Jury against the appellants.

We have also referred to the unlawful recordings played before the Grand Jury. This would also have the effect of prejudicing the Grand Jury.

There is a part of the record in this case the Grand Jury testimony of Joyce Johnson who was under investigation. At that time appellant Laughlin had no connection with Joyce Johnson. While the Grand Jury was waiting for Joyce Johnson to return from the noon recess Mr. Sullivan then again played before the Grand Jury the unlawful recordings between Mrs. Gross and appellant Laughlin.

Another instance of the lack of fundamental fairness is shown when the record reflects that Mrs. Gross was permitted to go before the Grand Jury on at least four occasions to "correct" her testimony. No such opportunity was given to the appellants.

We have already set forth in points 4, 5, 6, 7, 8 and 9 other instances which show a lack of fundamental fairness.

This Court has carefully scrutinized the matter of fairness in the criminal trials and the conduct of government officers. Only the most recent case of Levin v. Katzenbach (No. 19590 decided May 19, 1966) shows this.

In United States v. Ragen, 86 Fed. Supp. 382 (was a habeas corpus proceeding) the Court said:

"Due process also identifies itself with due course of justice."

A state case widely cited is People v. Savvides, 136 NE(2) 853:

"The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach."

In Sherman v. United States, 356 US 378, Justice Frankfurter said:

"Insofar as they are used as instrumentalities in the administration of justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them."

See also Barbee v. Varden, 331 Fed(2nd) 842; Curran v. Delaware, 259 Fed(2nd) 707, and United States ex rel Almeida v. Baldi, 195 Fed(2nd) 815.

THERE WAS NO EVIDENCE OF A CONSPIRACY

In this case there was no showing that a conspiracy in fact existed. It will be seen that it depended entirely upon the testimony of Mrs. Gross who was thoroughly and completely discredited. We will enumerate a little later on, with appropriate references to the record the many, many acts of perjury that she freely admitted. In fact it appears that she was granted complete immunity from prosecution for perjury. The witness Mrs. Smith testified that she had never seen appellant Laughlin in advance of the trial, had not talked with him or had she received any money from him. She further testified that she had received no money from Forte. Her dealings were always with Mrs. Gross. The testimony as to a conspiracy fell far short of the requirements of the law.

"It is clear that the declarations of a conspirator are admissible against his coconspirators if made in furtherance of the conspiracy. However it is equally clear that there must be independent evidence a defendant participated in the conspiracy before such declarations are admissible against him."

Glasser v. United States, 315 US 60.

United States v. Consolidated Laundries, 291  
Fed(2nd) 576.

United States v. Stromberg, 268 Fed(2nd) 256.

"A defendant's participation in the conspiracy . . . can be established only by proof, properly admitted into evidence, of their own words and deeds."

United States v. Russano, 257 Fed(2nd) 712.

"Such evidence or independent proof must be substantial and not 'too slight'."

United States v. Stromberg, supra.

See also United States v. Bentvena, et al, 319 Fed(2nd) 916.

The danger of admitting post conspiracy declarations is set forth in 52 Michigan Law Review 1173:

"Declarations made after the conspiracy ends are particularly untrustworthy. Once the conspiracy terminates the interest of every member is to avoid responsibility and shift the blame. What he says about himself may well be true and is at any rate against his own interest. But what he says about others may be based on spite, fear, pique, malice, a desire to stand well with the prosecutor or many other motives not leading to truth."

One of the oldest cases in our own jurisdiction is that of United States v. Gunnell, 16 DC Reports 196, 5 Mackey 196 (1886).

"Whilst all the acts and declarations of one alleged conspirator may be given in evidence against himself, no declaration of his can be given in evidence against his co-defendant, unless there has first been some evidence offered tending to prove a conspiracy and to implicate such co-defendant and then only those declarations are admissible which were made during the progress of the conspiracy and in furtherance of its object. Declarations which are merely narrative of past occurrences are to be rejected."

A very recent case Jones v. United States, 365 Fed(2nd) 87, is helpful here:

"Declarations made by conspirator to coconspirator are not admissible to establish connection of third party with conspiracy."

The Jones case cited Thomas v. United States, 57 Fed(2nd) 1039, 1042:

"Mere knowledge or approval or acquiescence in the object and purpose is not enough to constitute one a party to the conspiracy."

FAILURE TO INSTRUCT ON DEFENDANT'S  
THEORY OF THE CASE

The following instruction was tendered to the trial judge (Tr. 2343, 2344):

"You are instructed that Forte has testified that his relationship with the witness Gross was instigated by Gross and the purpose of their meetings and telephone conversations was for Gross to supply Forte with information concerning one Samuel E. Wallace and that money was given by Forte to Gross for the purpose of covering Gross' expenses and to pay for the information concerning Wallace. If the jury believes the testimony of Forte or if the jury has any reasonable doubt concerning the matters about which Forte testified then the jury must return a verdict of not guilty as to Forte. In other words if the jury believes that Forte was not a party to any conspiracy and did not either directly or indirectly attempt to influence Jean Smith as alleged in the indictment or if the jury has any reasonable doubt as to these matters then the jury must return a verdict of not guilty as to Forte."

This was refused. We believe that Levine v. United States clearly sets forth that the denial of such an instruction is reversible error. We note that in Levine (104 US App. DC 281; 261 Fed(2nd) 747,) the Court quoted with approval from Calderon v. United States, 279 Federal 556, 558:

"Where the evidence presents a theory of defense, and the Court's attention is particularly directed to it, it is reversible error for the Court to refuse to make any charge on such theory."

and the more recent case of Marson v. United States, 203 Fed(2nd) 904:

"Where a defendant in a criminal case presents a theory supported by the evidence, and the Court's attention is particularly directed to it, it is reversible error to refuse to give a charge on such a theory."

FAILURE TO CALL AN ESSENTIAL WITNESS

The record in this case will clearly show that Detective Samuel E. Wallace was himself under investigation. However it will be seen that he played a very active part in the investigation of this case and interviewed many witnesses. He was virtually permitted to investigate himself and suggested to various persons that they submit to lie detector tests while he himself would never take one. The record will show that he was permitted to ingratiate himself with the Grand Jury and of course under the coaching of the Assistant United States Attorney the questioning was led away from any possible involvement of Wallace. In any event he was not called as a witness. Two prayers were tendered with respect to the failure of the Government to call Wallace but they were denied. We were also denied the right to comment on the failure to call him. This was error.

United States v. Cotter, 60 Fed(2nd) 689 CCA 2,  
Opinion by Judge Hand.

United States v. Beekman, 155 Fed(2nd) 580 CCA 2,  
Opinion by Judge Frank.

United States v. Jackson, 257 Fed(2nd) 41 CCA 3,  
Opinion by Judge Goodrich.

The opinion by Judge Goodrich in the Jackson case is perhaps the most elaborate treatment on this important aspect of the criminal law.

There is an additional reason why we should have been allowed to comment on the failure to call Officer Wallace. He himself had been accused of wrongdoing and the Court was earlier told that the Grand Jury

would make a full and complete inquiry into the allegations against Wallace.

In Jones v. States, 194 SW 1108, the Court said:

"In a prosecution for violation of the local option law, the accused should be permitted to prove a conspiracy between the state's witnesses and officials and that such witnesses, to escape punishment for crimes for which they were in jail, fabricated testimony against the accused."

## CONVICTION OF DR. FORTE IN NORTH CAROLINA

We contend that the Court abused its discretion in permitting the government counsel to ask Dr. Forte about a conviction some twenty years previous. This is particularly true when he had received a pardon from the Governor of the State (Transcript 2342). We believe that there was present in Dr. Forte's case certain extenuating circumstances set forth in Luck v. United States, 121 US App. DC 151; 348 Fed(2nd) 763.

In any event counsel for Dr. Forte requested the Court to grant the following prayer: (Tr. 2342)

"In connection with Forte's criminal record you are further instructed that in evaluating such criminal record as affecting Forte's credibility you may also consider the explanation given by Forte on the witness stand attenuating such conviction, including the testimony that Forte had received a pardon from the Governor of the State where the conviction was had."

This was denied. This was error.

In United States v. Boyer, 80 US App. DC 202, this Court said:

"Since not all guilty men are equally guilty and some convicted men are innocent we think the witness should be allowed either to extenuate his guilt or to assert his innocence of the previous charges."

RESTRICTION OF CROSS EXAMINATION

The official reporter had not completed the transcript as of November 5, 1966. However, Mrs. Gross on cross examination said that she could be reinstated to the police force in Baltimore upon payment of \$500.00 to a certain party. We felt that we were entitled to this information in that it might have had an important bearing on the future cross examination. However we were denied that right.

# DENIAL OF CAUTIONARY INSTRUCTIONS

We have contended consistently that there was no conspiracy.

We believe it is plain that the testimony of Mrs. Gross should not have been received unless and until there had been a showing of the existence of a conspiracy. This Court in Taylor v. United States, 104 US App. DC 219; 260 Fed(2nd) 737, cited the applicable law:

"Such declarations are admissible over the objection of an alleged coconspirator, who was not present when they were made only if there is proof aliunde that he is connected with the conspiracy."

In view of this we contend that it was error to deny the cautionary instructions tendered.

### THE MATTER OF DISCOVERY

While we were furnished a considerable number of Grand Jury transcripts in this case it is our view that in the light of the recent case of Dennis v. United States, 86 Sup.Ct.—, we should have been given the entire Grand Jury minutes. In the light of the peculiar circumstances existing in this case and particularly considering the manner in which Wallace and Gross were handled the most liberal discovery should have been allowed.

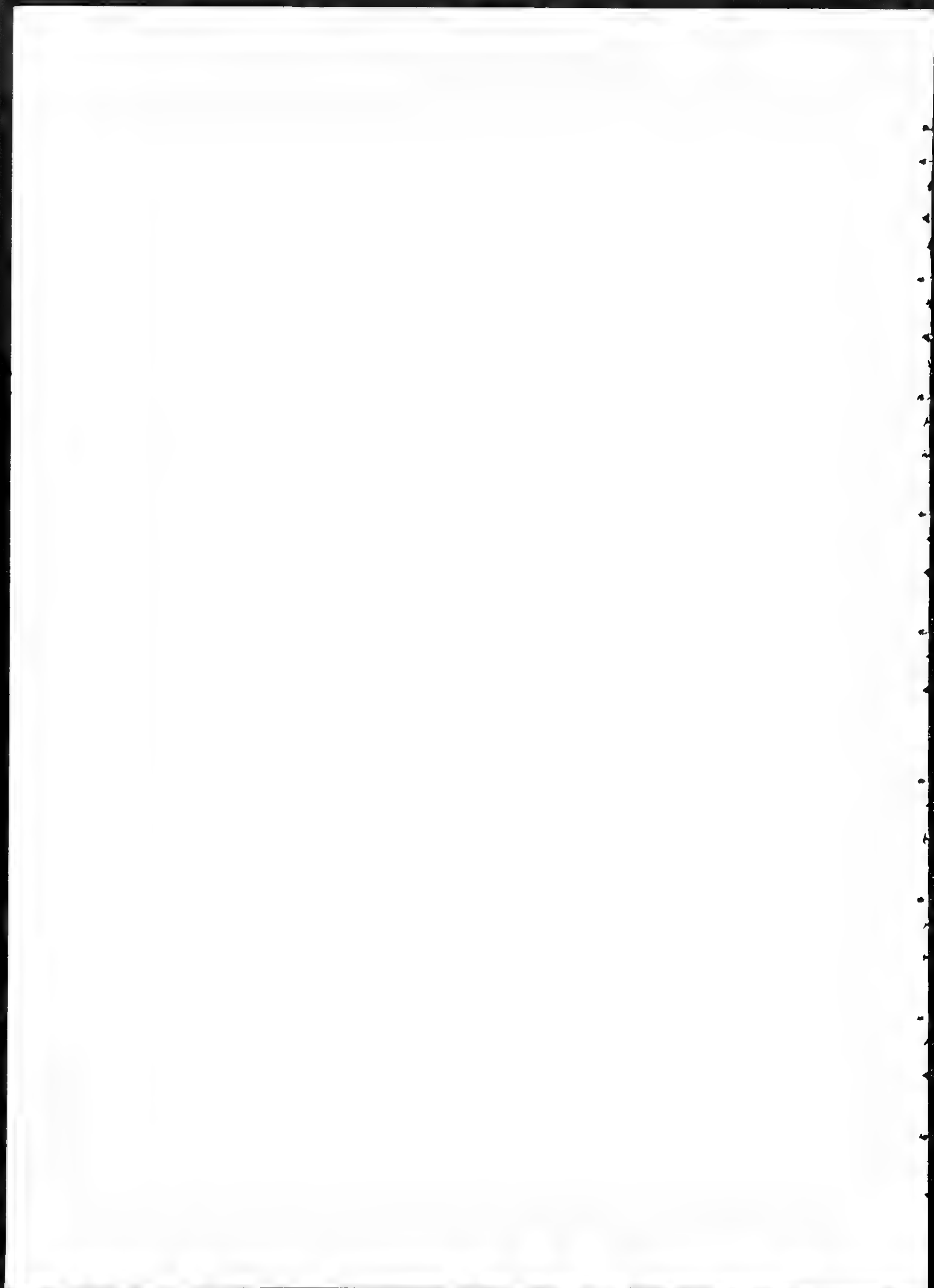
### CONCLUSION

It is plain that reversible error was committed in many instances. However it is our hope that the Court, in the interest of justice, will consider all our points. With that done it will end this litigation, and all other litigation connected with it, once for all.

In view of what has been said we ask that the judgment below be reversed with instructions to enter a judgment of acquittal.

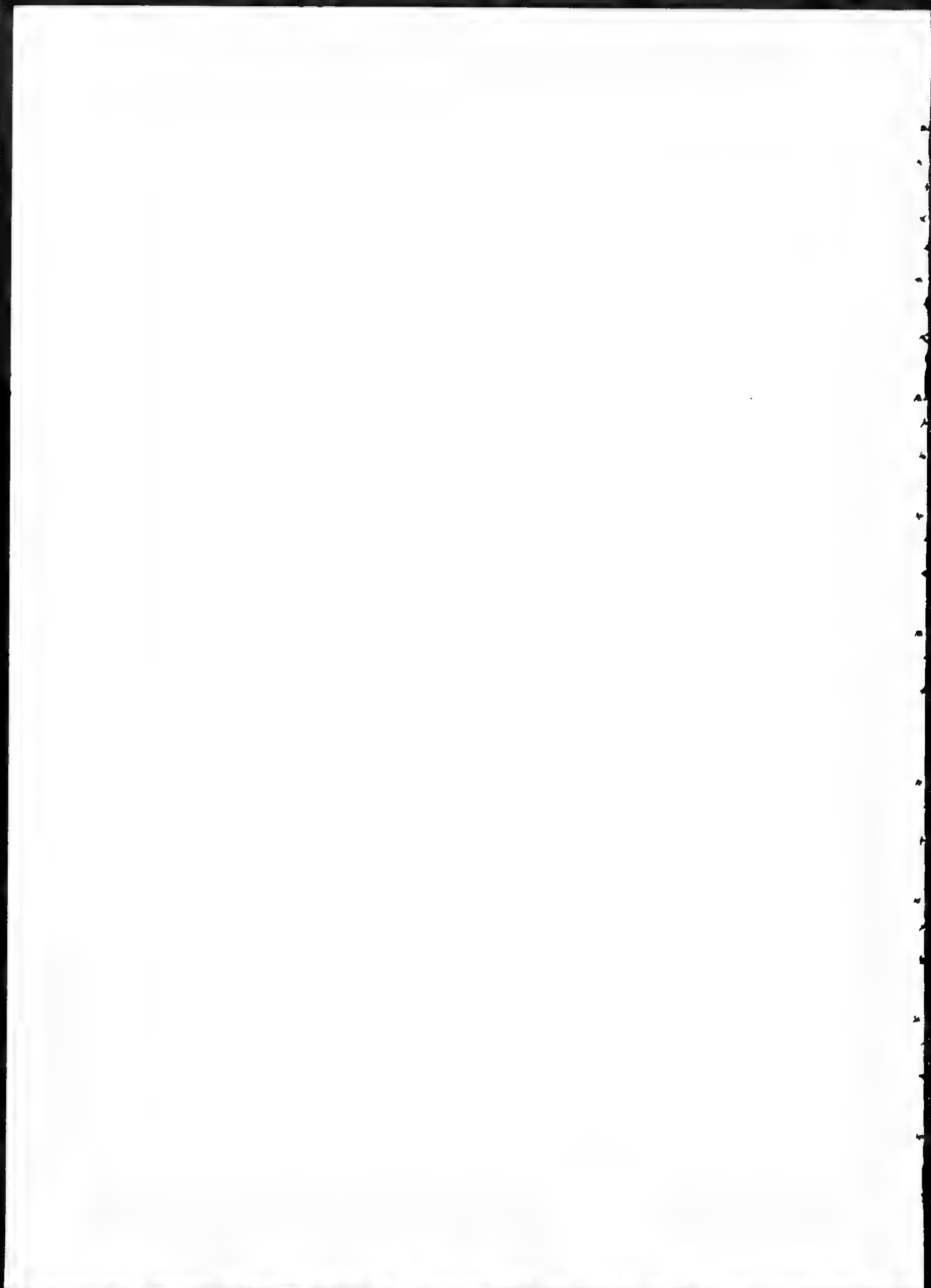
James J. Laughlin  
Appellant in proper person.

William J. Garber  
Counsel for Forte.



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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term  
Grand Jury Sworn in on January 2, 1963

|                              |   |                             |
|------------------------------|---|-----------------------------|
| THE UNITED STATES OF AMERICA | : | Criminal Case No. 600-63    |
|                              | : |                             |
| v.                           | : | Grand Jury Original         |
|                              | : |                             |
| ALLAN U. FORTE               | : | Violations: 18 U.S.C. 371;  |
| JAMES J. LAUGHLIN            | : | 18 U.S.C. 1503 (Conspiracy; |
|                              | : | Influencing Witness)        |

The Grand Jury charges:

COUNT ONE

1. That a Grand Jury was sworn in on July 5, 1961, in the United States District Court for the District of Columbia and is known and hereinafter referred to as the July 1961 Grand Jury. That on September 11, 1961 Allan U. Forte was indicted by the July 1961 Grand Jury in Criminal Case No. 741-61, United States v. Allan U. Forte, and charged in four counts, each of which charged a violation of the abortion statute of the District of Columbia, Title 22, District of Columbia Code, Section 201.

2. That a petit jury was sworn in on February 12, 1963, in the United States District Court for the District of Columbia for the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, at which trial the defendant Allan U. Forte was represented by counsel James J. Laughlin.

3. That the said Allan U. Forte and the said James J. Laughlin, the defendants indicted in this count, well knew the proceedings preliminary to and the trial of Counts One and Two of the aforesaid indictment would and did involve, among other things,

a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things:

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and
- c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

4. That commencing or on about September 1, 1961, and continuously thereafter until on or about February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, and the States of Maryland and Virginia and at other places unknown to this January 1963 Grand Jury, the said defendants Allan U. Forte and James J. Laughlin did unlawfully, wilfully, and knowingly conspire, combine, confederate, and agree together, and with each other, and with one Bernice Gross, a co-conspirator but not made a defendant herein, and with other co-conspirators unknown to this January 1963 Grand Jury, to defraud the United States and to commit other offenses against the United States, to wit, violations of Title 18, United States Code, Section 1503 (Influencing Witness), Section 1621 (Perjury), and Section 1622 (Subornation of Perjury).

5. That it was part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial, and, if she did not absent herself, then, to testify falsely to the aforesaid matters at said proceedings and trial.

6. That it was also part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting, and having reason to know well, believe, and expect that one Dorothy Lee Birge would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs a, b and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting, and persuading her to testify falsely to the aforesaid matters at said proceedings and trial.

7. That it was also part of the said conspiracy that the said defendants and co-conspirators, would and did corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia in the proceedings preliminary to, and in the trial of, Counts one and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, in the manner and by the means above described.

#### OVERT ACTS

At the time and places hereinafter mentioned, the said defendants and co-conspirators committed, among others, the following overt acts in furtherance of the said conspiracy and to effect the objects hereinbefore described and alleged:

1. On or about September 1, 1961, the defendant Allan U. Forte engaged in a telephone conversation with Dorothy Lee Birge who was then in Alexandria, Virginia.
2. On or about April 15, 1962, a co-conspirator unknown to the Grand Jury, engaged in a telephone conversation with Dorothy Lee Birge who was then in Alexandria, Virginia.
3. On or about May 15, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.
4. On or about May 20, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.
5. On or about May 25, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was

then in Baltimore, Maryland.

6. On or about September 10, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

7. On or about September 13, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

8. On or about September 15, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

9. On or about September 17, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

10. On or about September 18, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

11. On or about September 20, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

12. On or about October 10, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

13. On or about October 11, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

14. On or about October 11, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

15. On or about October 13, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

16. On or about October 14, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

17. On or about October 16, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

18. On or about October 16, 1962, the defendant Allan W. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

19. On or about October 18, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

20. On or about October 18, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

21. On or about October 22, 1962, around the mid-day, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

22. On or about October 22, 1962, in the mid-afternoon, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

23. On or about October 22, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

24. On or about October 23, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

25. On or about October 25, 1962, Bernice Gross met Jean . Smith in Baltimore, Maryland.

26. On or about October 26, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

27. On or about October 26, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

28. On or about October 29, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

29. On or about October 29, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

30. On or about November 5, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

31. On or about November 6, 1962, Bernice Gross met Jean Smith in Catonsville, Maryland.

32. On or about November 8, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

33. On or about November 9, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

34. On or about November 9, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

35. On or about November 13, 1962, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross.

36. On or about November 13, 1962, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

37. On or about November 18, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

38. On or about November 22, 1962, Bernice Gross met Jean Smith in Baltimore, Maryland.

39. On or about November 27, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the

defendant James J. Laughlin, who was then within the District of Columbia.

40. On or about December 1, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

41. On or about December 3, 1962, the defendant Allan U. Forte, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

42. On or about December 3, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

43. On or about December 18, 1962, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

44. On or about December 20, 1962, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

45. On or about December 22, 1962, Bernice Gross met Jean Smith in Baltimore, Maryland.

46. On or about January 7, 1963, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant Allan U. Forte, who was then within the District of Columbia.

47. On or about January 10, 1963, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

48. On or about January 16, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

49. On or about January 16, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

50. On or about January 17, 1963, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

51. On or about January 18, 1963, on two separate occasions, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with Jean Smith who was then in Catonsville, Maryland.

52. On or about January 18, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

53. On or about January 18, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

54. On or about January 20, 1963, Bernice Gross who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then in Washington, D.C.

55. On or about January 22, 1963, the defendant James J. Laughlin, who was then in Washington, D.C., engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

56. On or about January 25, 1963, the defendant Allan U. Forte met Bernice Gross in Baltimore, Maryland.

57. On or about January 29, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

58. On or about January 31, 1963, Bernice Gross met Jean Smith in Baltimore, Maryland.

59. On or about February 7, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

60. On or about February 7, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

61. On or about February 11, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

62. On or about February 12, 1963, in the morning hours, the defendant Allan U. Forte, who was then in Baltimore, Maryland,

engaged in a telephone conversation with the defendant James J. Laughlin, who was then in the District of Columbia.

63. On or about February 12, 1963, in the morning hours, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

64. On or about February 12, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

65. On or about February 12, 1963, in the afternoon hours, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

66. On or about February 13, 1963, the defendant James J. Laughlin, who was then within the District of Columbia, engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

67. On or about February 14, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

68. On or about February 15, 1963, the defendant Allan U. Forte engaged in a telephone conversation with Bernice Gross who was then in Baltimore, Maryland.

69. On or about February 15, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation

with the defendant James J. Laughlin, who was then within the District of Columbia.

70. On or about February 18, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

71. On or about February 19, 1963, Bernice Gross, who was then in Baltimore, Maryland, engaged in a telephone conversation with the defendant James J. Laughlin, who was then within the District of Columbia.

#### COUNT TWO

1. The first two numbered paragraphs of Count One of this indictment are by reference incorporated into, and made a part of, this count.

2. That the said Allan U. Forte, the defendant indicted in this count, well knew the proceedings preliminary to and the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things:

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and

- c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

3. That from about September 1, 1961 to February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, the defendant Allan U. Forte, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, including subparagraphs a, b, and c thereof, the defendant, Allan U. Forte, did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial, and, if she did not absent herself, then, to testify falsely to the aforesaid matters at said proceedings and trial.

#### COUNT THREE

1. The first two numbered paragraphs of Count One of this indictment are by reference incorporated into, and made a part of, this count.

2. Paragraph number two, including subparagraphs a, b, and c of Count Two of this indictment is by reference incorporated into,

and made a part of, this count.

3. That on or about September 1, 1961, the aforesaid Allan U. Forte, the defendant indicted in this count, well knowing, believing, and expecting, and having reason to know well, believe, and expect that one Dorothy Lee Birge would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, the defendant Allan U. Forte did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting, and persuading her to testify falsely to the aforesaid matters at said proceedings and trial.

#### COUNT FOUR

1. The first two numbered paragraphs of Count One of this indictment are by reference incorporated into, and made a part of, this count.

2. That the said James J. Laughlin, the defendant indicted in this count, well knew the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid trial to ascertain;

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;

- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith and by what means; and
- c. Whether the said Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

3. That from about April 15, 1962 to February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, the defendant James J. Laughlin, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, including subparagraphs a, b, and c thereof, the defendant James J. Laughlin, did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then, to absent herself from the said proceedings and trial, and, if she did not absent herself, then, to testify falsely to the aforesaid matters at said proceedings and trial.

/s/ DAVID C. ACHESON  
ATTORNEY OF THE UNITED STATES IN  
AND FOR THE DISTRICT OF COLUMBIA

A TRUE BILL

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Foreman

READING WITHDRAWN COUNT

In the opposition to the motion for new trial filed by the government they have incorporated pages 3051 and 3052 of the transcript as follows

"The trial transcript, pp. 3051 and 3052, indicates that the following took place at the bench at the conclusion of the Court's charge:

'MR. GARBER: Your Honor, during the course of the instructions Your Honor was reading from the indictment and, as I recall, Your Honor read paragraph 6 on page 2.

THE COURT: Yes.

MR. GARBER: That referred to Birge.

THE COURT: Yes.

MR. GARBER: And that material was stricken out.

THE COURT: It was not out of the copy I received, was it?

MR. GARBER: Well, actually this referred to Count 3, which was dismissed.

THE COURT: Do you want me to clarify it?

MR. GARBER: I feel at this point that to call the jury's attention to it would compound the effect that the reading of this might have. Therefore, on the basis of the Court's reading paragraph 6 of count 1 of this indictment, referring to Birge and not referring to Smith, I would move for a mistrial.

THE COURT: You don't want me to make any explanation?

MR. GARBER: Your Honor, I feel if you made an explanation, it would only compound what has already been done.

THE COURT: So therefore I understand you do not want me to make an explanation?

MR. GARBER: I would not ask for an explanation.

THE COURT: Mr. Laughlin, do you join in that?

MR. LAUGHLIN: I join in that point, and I agree with that. It would be prejudicial as far as both defendants are concerned.

THE COURT: Mr. Lowther?

MR. LOWTHER: There is no grounds for mistrial here, sir.

THE COURT: I deny the motion for mistrial. As I understand, both counsel do not want any explanation made of paragraph 6, and I will not make any. You don't want any explanation made either, of paragraph 6, Mr. Lowther?

MR. LOWTHER: No sir.'"

This is found at pages 4 to 6 of the Government's opposition filed July 15, 1965.

REFUSAL TO INSTRUCT THAT REASONABLE DOUBT  
MAY ARISE FROM THE LACK OF EVIDENCE

The record shows that the following instruction was  
tendered and refused:

"You are instructed that a reasonable doubt may  
arise from the evidence in the case and you are also  
instructed that a reasonable doubt may arise from  
lack of evidence."

In the opposition to the motion for new trial filed by  
the government it is not questioned that the instruction was  
tendered and refused. In endeavoring to justify the refusal  
the government said:

"The court's instructions on reasonable doubt  
were fair, impartial and sufficient, and therefore  
the refusal to grant defendants' requested instruc-  
tions on reasonable doubt was neither improper or  
prejudicial."

FEDERAL JURY PRACTICE AND INSTRUCTIONS, Matthes and Devitt  
(1965) Chapter 8.01 (page 83):

"A reasonable doubt may arise not only from  
the evidence produced but also from a lack of  
evidence . . .")

COLLATERAL ESTOPPEL

The government's opposition to motion for new trial concedes that the telephone records were received in evidence. However there is an attempt to justify the admission of the telephone records in evidence. The opposition of the government (July 15, 1965) says this:

"6. The doctrine of collateral estoppel did not prevent the reception into evidence of testimony relating to telephone conversations or telephone records in this case. No tapes of any telephone conversations were offered in evidence. There has been no previous judicial determination holding inadmissible any of the testimony relating to any of the telephone conversations testified to in the case before this Court. There has been no previous judicial determination holding inadmissible any of the telephone records testified to and admitted before this Court. In dismissing the indictment in Cr. No. 599-63, Judge Curran ruled that certain tape recordings were not obtained with the voluntary consent of Mrs. Bernice Gross, and that without these recordings there was insufficient corroboration to support a charge of perjury. United States v. Laughlin, 223 F. Supp. 623 (1963). The United States Court of Appeals for the District of Columbia Circuit held that this determination precluded further litigation of the issue of Mrs. Gross' consent to the recording of the conversation and prevented their use as evidence in this trial. Laughlin v. United States, \_\_\_\_\_ U.S. App. D.C. \_\_\_\_\_, 344 F.2d 187 (1965). However, there is no decision holding inadmissible in evidence testimony relating to the telephone conversations testified to before this Court or the telephone records introduced in evidence before this Court."

It is noted that the government referred only to Judge Curran's first opinion, 223 Fed. Supl. 623. It must not be overlooked that after Judge Curran's opinion dismissing the indictment (233 Fed. Supl. 623) the government was not content to accept Judge Curran's ruling but asked that the matter of the telephone records be litigated. The records were offered in evidence. The

government submitted in evidence voluminous records consisting of several dozen blown up records of telephone calls and telephone bills with considerable supporting documentary evidence. The appellants pressed the matter vigorously. There can be no question that Judge Curran considered the matter carefully and exhaustively. In his opinion (226 Fed. Supl. 112) he said:

"In support of its first proposition, the Government attached to its motion photostatic copies of the telephone company records of the telephone calls and the bills for the same.

These records prove only one thing, if they prove anything at all, and that is, telephone calls were made between certain phone numbers. To argue from a phone company record showing a call between certain phone numbers that the persons whose names those phones are listed made the call is destructive of a very important rule of evidence; namely, that the person making the entry (in this case the telephone operator) should be making the entry based on personal knowledge. This principle has often been invoked in excluding entries made by a person who had no personal knowledge of the supposed facts recorded. (It hardly need be pointed out that this same rule applies with equal force to a person-to-person call, as there the operator has no personal knowledge of the real parties making the call, but only records the names given to her.)

With regard to the telephone company bills it should be noted that because the person in whose name the telephone is listed pays the bills for calls billed to his listing, it is no proof whatsoever that certain of those calls were made by him personally, as any of several people may have permission to use his telephone and this is especially true in the case of a business phone."

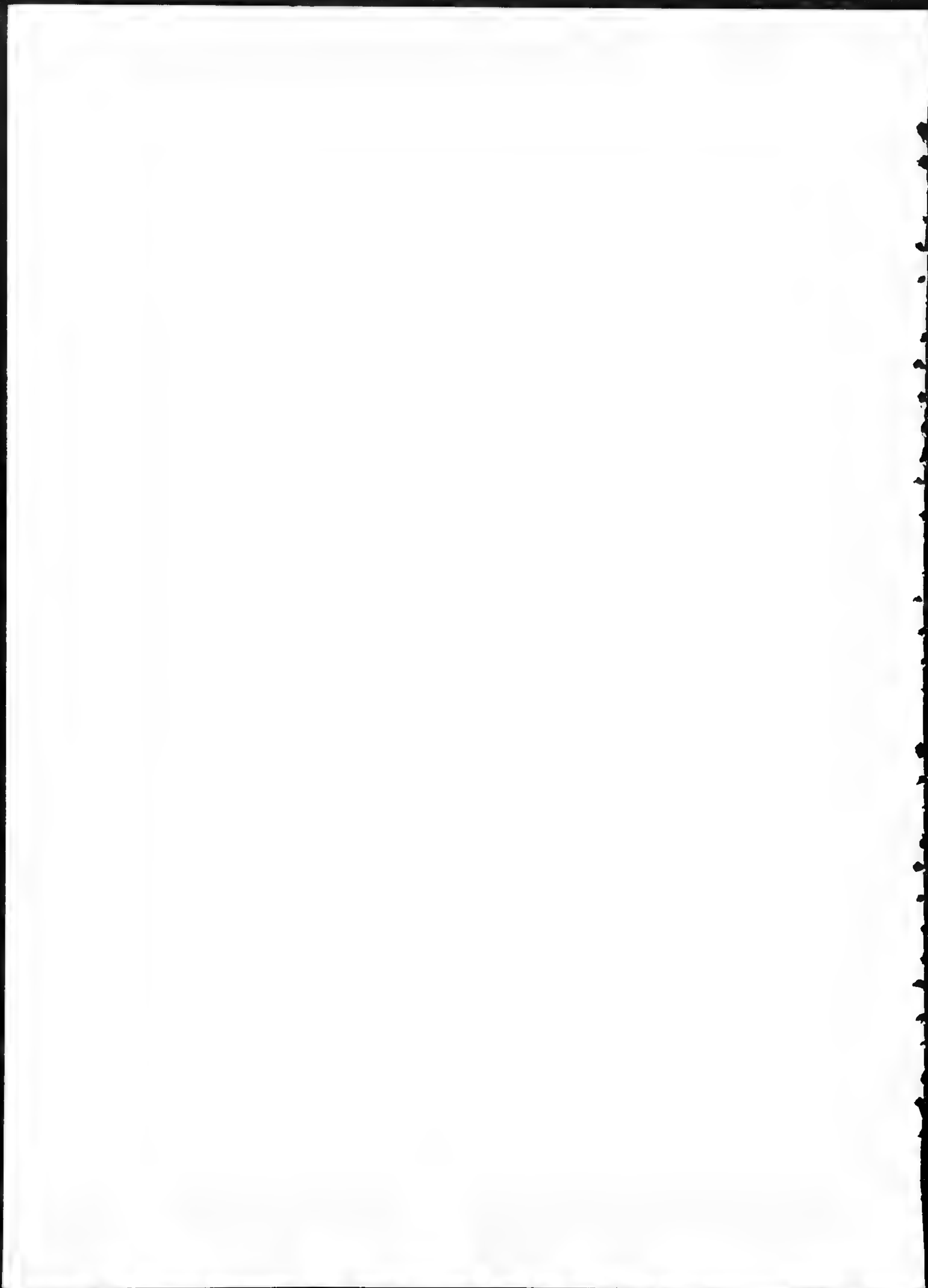
United States v. Laughlin, 226 Fed. Supl. 112

This was an important issue of fact. The Government wanted it litigated and it was litigated. The Government was not satisfied with Judge Curran's judgment - against the Government and noted an appeal to this Court. The Government later dismissed the appeal.

In Laughlin v. United States, 120 Fed (2nd) 93 - note 15 on page 6 says this:

"Since the Government had the right to appeal, 18 US 3731 it was duty bound to proceed accordingly or become subject to the doctrine of collateral estoppel. In fact, the Government did note an appeal, but it was later dismissed on the Government's own motion."

As to the point of grand jury bias as well as the point having to do with the coercion of Mrs. Gross, we desire to point out that there is included in the record in this case certain grand jury transcripts-- March 1, 1963 and March 26, 1963. The page numbers refer to these transcripts. On March 1, 1963, Mrs. Gross testified before the grand jury on two occasions. Between her first and second appearance she was taken to the office of Assistant United States Attorney Hannon and interrogated for over two hours. She was constantly reminded that she had committed perjury and was subject to indictment. She was also urged to get on the "right team". She was later asked by Mr. Hannon and Mr. Sullivan to swear to the truth of the statements in Mr. Hannon's office. The other transcript referred to relates to the testimony of Officer Wallace on March 26, 1966.



GRAND JURY BIAS

1. Playing of the unlawful recordings before the grand jury. The contents of these recordings are set forth in 1200115 App. DC 93 - Laughlin v. United States and United States v. Laughlin, 222 Fed. Supl. 264.

2. Grand jury proceedings March 1, 1963 - first appearance of Mrs. Gross:

"Q Would you please tell us your full name?

A Bernice Gross.

Q And your home address?

A 2715 Uhler Avenue, Baltimore 15.

Q That is Mrs. Gross, isn't that correct?

A Yes.

Q Mrs. Gross, you are here under subpoena today, is that so?

A Yes, sir.

Q I might mention to the jury that Mrs. Gross was nice enough to come over this morning just under sort of an oral subpoena and be served here since the marshals missed her in Baltimore.

A That's right, they did.

Q In the course of a prosecution which just concluded here in Washington, Allan Forte was found not guilty of an alleged abortion committed by him in July, 1961, on a girl by the name of Jean T. Smith of Baltimore, Maryland. During the course of that trial certain allegations were made to the effect that Detective Sergeant Samuel E. Wallace of the Metropolitan Police Homicide Squad had approached Forte in August of '61, in January of '63 and again on February 6th of 1963. Forte swore under oath during the course of that trial that Wallace approached him at those times and in several phone conversations over the period from the arrest to the trial, and that in those approaches

Wallace told Forte that for a payment of two thousand dollars to Wallace he would take care of the case, or fix the case. The case being talked about is a case under our number 741-61. It was a four-count indictment; two abortions were charged, each in two different ways; one as an abortion and one attempted abortion. I don't know if you have that same statute in Baltimore or not?

A Un hum.

Q But it was charged in that way. Prior to the trial the abortion and the two counts involving Jean Smith were severed from the abortion and the two counts involving a Dorothy Lee Birge. The matter is still pending trial; I believe the trial date is March 24, 1963, or thereabouts. In any event, Forte alleged that Wallace tried to shake him down and fix the case on trial. He alleged that for the payment of 250 dollars Wallace assured him that he, Wallace, would give Forte police protection and he could operate as an abortionist with a clean bill of health here in Washington, D.C. During the same trial there was another allegation made -- this was out of the presence of the jury during the course of a motion to suppress evidence -- and that Dorothy Lee Birge testified that Forte had called, or a man who sounded like Forte, and spoke about paying Birge 300 dollars. She said she never accepted it and that basically that was the end of it. But that charge was made during the course of the trial.

Now it will be material to the Grand Jury's investigation now under way for us to determine whether there really was an attempt to obstruct justice during the course of the trial of that case by a policeman soliciting money from Forte to fix the case -- well, by a policeman soliciting money from Forte for even if not for fixing the case, for giving Forte a clean bill of health to operate as an abortionist, or by the policeman approaching Forte for money to obstruct justice in any way regardless.

It is material and significant that the Grand Jury find out all matters and we are conducting an investigation of witnesses under oath for that purpose.

\*\*\*\*\*

"Now with each witness that comes before the Grand Jury, even if they have police experience -- we went into that with witnesses this morning -- that I'm an Assistant United States Attorney and in that capacity do tell you as a witness, which I'm sure you already know, that you

have a Constitutional right under the Fifth Amendment of the Federal Constitution to refuse to testify about a matter which might tend to incriminate you in any way. And in the Federal system we mean that you have a right to refuse to answer a question on a matter which might lead up or in the next logical series of questions open the door to a series of questions the answers to which might tend to incriminate you. So basically that is the caveat that we give to every witness that comes before us today.

Now, you do have police experience in Baltimore, isn't that correct?

A Yes, sir.

Q And you do understand that you do have the right under the Constitution to protect yourself against self-incrimination?

A Yes, sir.

Q Do you understand as I have explained it that it will be material to this Grand Jury's investigation to find out whether a member of the police force attempted to solicit money in order to fix the case or to claim that the case could be fixed, or to give Forte a license to operate as an abortionist or to obstruct justice in this matter in any way?

A Uh hum.

Q Understanding those things do you wish to invoke your right against self-incrimination or do you wish to testify?

A I'll testify.

Q Fine. Now would you tell the Grand Jury what your police experience has been, Mrs. Gross?"

\*\*\*\*\*

"Q In the abortion squad work at that time did you participate in any way in the investigation of an alleged abortion allegedly committed on Jean Smith by Dr. Forte?

A Yes, sir.

Q Would you please tell the jury what your contact with the case was?

A I was one of the original policewomen to take the first statement from Jean Smith in the hospital, St. Agnes Hospital, and I don't recall when we went back to her home with Sergeant Wallace -- and he was then a detective -- and a Detective Kelly, and we took another statement. Policewoman Burrell and the two men and myself. That was all."

\*\*\*\*\*

"Q Did Allan U. Forte or anyone representing himself to be acting on Forte's behalf approach you and give you any money or anything of value in return for any service or act by you concerning the alleged abortion on Dorothy Birge in '61, on Jean Smith in '61, or on Mrs. Robert Hill in 1963?

A No, sir."

\*\*\*\*\*

"Q Were you contacted by anyone representing himself to be active on the behalf of Allan U. Forte and offered money or anything of value for any act or service you might perform in connection with the matter of the alleged abortion of Jean Smith in July of 1961, Dorothy Birge in July of 1961 or the alleged abortion on Mrs. Robert Hill in January of 1963?

A No, sir."

\*\*\*\*\*

"Q Were you contacted by an attorney representing himself to be Forte's lawyer and offered any money or anything of value in return for any service you might perform in connection with the alleged abortion of Jean Smith in July of 1961 --

A No, sir."

\*\*\*\*\*

"Q Other than the pay check you received from the police department for your official duties did you receive any money or anything of value for anything you did do in

connection with the alleged abortion committed by Forte in July of 1961 on Jean Smith?

A No, sir."

\*\*\*\*\*

"Q Mrs. Gross, that concludes our series of questions, and the procedure we are following today is to take care of all witnesses and in case the Grand Jury has any questions based on what they have heard, the witness will be called back. Now we do have some additional two witnesses, one based on some information which we received ... and -- well, I discussed it on the phone with you last night, to the effect that Mrs. Smith -- well, just for the information of the Grand Jury, when we spoke on last evening we wondered about what possible reason there could be for the jury coming back not guilty in the case involving the alleged abortion of Mrs. Smith.

A That's right.

Q And I suggested that Mrs. Smith's answers in the trial weren't those strong forceful answers they could have been; there was a little bit of hesitation. And always in an abortion case there is embarrassment. Mrs. Smith, as I told you jurors before, has some four children and there is embarrassment that comes from that and coming to testify.

A That's right."

\*\*\*\*\*

### 3. Interrogation in Mr. Hannon's office. (March 1, 1963)

After Mrs. Gross testified before the grand jury on her first appearance she was taken to the office of Assistant United States Attorney Hannon where she was questioned for some two hours and a half. Mr. Sullivan joined in the questioning. Mrs. Gross was without benefit of counsel. It was apparent that Mrs. Gross was unaware of just what was going on. We refer now to proceedings in the office of Mr. Hannon:

"MR. SULLIVAN: Mrs. Gross, I have asked the reporter to stay. I want to say the same things I said in the Grand Jury to you again. We want your cooperation from you very

much, but first of all, just like I did in the Grand Jury, you have a perfect right under the Fifth Amendment to say I don't want to say anything. It is a perfect right you have. No one can hold it against you, even if it is a question that leads up logically to another one that is going to get you in trouble.

After Sullivan made this statement, Mrs. Gross said:

"MRS. GROSS: I don't want that. I had that once. I told you.

MR. SULLIVAN: Yes.

MR. HANNON: I think the record should show that we are in my office, Room 3449. I am Joseph M. Hannon, Assistant United States Attorney."

\*\*\*\*\*

MR. SULLIVAN: Well, this is it. In the Forte trial just finished up we believe that we have considerable evidence, considerable important evidence that Forte tried to pay off some witnesses. So the evidence we have we believe that -- well, for instance, after the conclusion of the trial Forte's lawyer called you, said he was dissatisfied with how much you didn't help out in the case, Jean Smith came and testified, and so on. The evidence we have is pretty clear. We have evidence that you paid out certain money on behalf of them; certain money was received from you in order to get witnesses to lie or to try to get out of coming to trial, to tell a lie on the stand. For instance, Jean Smith didn't recognize Forte at all, that he wasn't the one that performed the abortion.

MRS. GROSS: That is not true. No, that is not true.

MR. SULLIVAN: Your answers then in the Grand Jury are just absolutely clear, there is no doubt about what you said. You said in there you understood what we were investigating and you knew it was an investigation to get truthful answers. That is all we want to do.

MRS. GROSS: Well, that is not true. I'll tell you the same thing I did the Grand Jury. I don't know anything, and that is it. Not a thing.

MR. SULLIVAN: Well, here's the thing, Mrs. Gross. We want your cooperation. I'm not saying you're not being truthful about that now but I'm saying we are sure of certain things. We are sure of that call of Forte's lawyer after the trial when he said he was dissatisfied.

MRS. GROSS: No, that isn't true; that isn't true.

MR. SULLIVAN: Someone said he was Forte's lawyer, someone you thought was?

MRS. GROSS: No; no.

MR. SULLIVAN: You don't have to say anything about it at all, not a single word, but here's the proposition I want to make to you. We want your truthful testimony, we want it very badly because we want to know who is putting up the money in this case to get witnesses to skip out on the trial or to come to the trial and lie. We want to know that very, very badly, and we know certain approaches --

MRS. GROSS: Well, has anyone skipped out? Have they? I really don't know. I really don't. Who has?

MR. SULLIVAN: Well, the question is, who tried to get people to skip out? Who paid money for what? A lot of people get involved when people try to work out a little scheme to get somebody to lie, and, for instance, if someone put up a little bit of money to contact you, for you to pass on money to Jean Smith, so many people get to know something like that that you can get caught in a bind.

MRS. GROSS: I was caught one time, Mr. Sullivan. I told you. I was caught in the police department. And I think I -- I know I got a raw deal at that time.

MR. SULLIVAN: But that had nothing to do with this.

MRS. GROSS: No, but you know what it leaves on you, it leaves a mark on you and you don't forget it that easily. I never thought I would have to go through this in length again as I did that one time last year. Believe me, I mean that's the truth; I had it then, understand? I thought I could never take anything again; nothing. I don't think I could; I really can't.

MR. SULLIVAN: I'll say this to you. When I talked on the phone last night, and Mrs. Gross and I talked earlier in the case, it has been such a pleasant relation that I feel bad because I have evidence that you are not telling the truth. I feel bad for you because there are things, and the answers you just gave in the Grand Jury there were clear answers, they were understandable answers, no equivocation. You said you realized the questions were material. You said you understood you had a right under the Fifth Amendment --

MRS. GROSS: Yes, but --

MR. SULLIVAN: You said you wanted to testify. You did testify and the Grand Jury is in position to be able to deliberate as to whether you committed perjury. I want you to know perjury over here carries a two-year minimum jail sentence and a maximum of ten. There is no sense of you getting caught in a bind if you can put the finger on who put this money up. Now we have evidence and it is a simple thing. It is tough for someone to spin somebody who has been given money. It's tough. But don't get caught in a bind yourself.

MRS. GROSS: No, the questions that were asked were mainly about Wallace, and I don't know anything about Wallace.

MR. SULLIVAN: But the questions that were asked you about whether you knew Forte's lawyer, whether Forte's lawyer contacted you --

MRS. GROSS: He had so many lawyers during this 18 months. Am I right or wrong?

MR. SULLIVAN: -- and whether Forte's lawyer gave you some money --

MRS. GROSS: No.

MR. SULLIVAN: -- for something you were to do in the case.

MR. HANNON: Are you saying you might know one of his lawyers but you don't know all his lawyers?

MRS. GROSS: I understand he had a few before this last one came up. I don't know if I'm right or wrong, because I remember in Baltimore where he had seven.

MR. SULLIVAN: Jimmy Laughlin called you in the last several days, didn't he?

MRS. GROSS: What is it that you want out of me, and what will happen to me?

MR. HANNON: The truth.

MRS. GROSS: I know, but I told the truth once before, too. I mean if you can't understand my position.

MR. SULLIVAN: I think I do.

MRS. GROSS: Do you? Because you're not familiar with what happened in Baltimore. You haven't any idea.

MR. SULLIVAN: I'm not, but someone in whose judgment I have some respect said something that made me have a little bit of understanding, and another person, Lorraine Burrell, in there when I said isn't Mrs. Gross off the force now, the way Mrs. Burrell answered -- she seems to be pretty straight and honest; she wouldn't even talk about it. It seemed to impress me that maybe you did get a raw deal.

MRS. GROSS: I did. I say when it happened to you once, and which I told everything that was happening and I was the only one that was dismissed, it stays with you.

MR. SULLIVAN: It sure does.

MRS. GROSS: Maybe you have never been in a position like that.

MR. HANNON: What Mr. Sullivan is suggesting is that you're in the switches again.

MRS. GROSS: I know, and I'm wondering what's going to happen to me.

MR. SULLIVAN: Here's what can happen. If you just simply tell the truth to the Grand Jury about who gave you the money, how much they gave and what they wanted you to get Jean Smith to do, I will tell the Grand Jury that our position is that a wrong has been committed, somebody tried to get a witness taken care of, a lot of money was spent on it, and without your testimony the whole thing falls apart.

MRS. GROSS: Then what will happen?

MR. SULLIVAN: Here's what will happen. I will say to that Grand Jury the U.S. Attorney's Office considers this to be about the dirtiest thing that has happened in a long time in a trial over here, there's been money passed out in the Jean Smith trial, Birge ---

MRS. GROSS: I don't know about it. I never met her. I don't know anything."

\*\*\*\*\*

"MR. SULLIVAN: If you tell the truth about what happened in the Smith thing -- I'm the DA that will be handling the Grand Jury; Mr. Hannon came in on it -- and I will say to the Grand Jury alone, or I'll say it with you present, I'll ask the Grand Jury to consider this fact: It is an important case where these people tried to get witnesses paid off, there's a lot of money being spent; justice can't work out if people are paying money like that; everything fails if the oath fails; but, Grand Jury, there is one thing you have got to do, give us this witness for trial; we need Mrs. Gross; without her we have nothing, with her we have got something; indict the big fish and let Mrs. Gross be a government witness; without her we have got nothing.

MRS. GROSS: In other words, if Jean Smith had gotten any money would she have testified? If she had gotten anything would she have testified the way she did? Truthfully?

MR. SULLIVAN: She did. Mrs. Smith got several sums of money; later came over here to Washington trying to get out of the case. The specific suggestion was made to her, say your baby is sick tomorrow and you don't have to go. What will I do next time, Mrs. Gross? Next time say you are sick. This thing will be taken care of, it will never go to trial. You say when you get on the stand, Mrs. Smith, you don't recognize Forte. I'm not going to lie, but these letters are written, the gifts of money are made.

MRS. GROSS: Who was supposed to have made the gifts of money?

MR. SULLIVAN: That's what we're hoping you're going to tell the truth about. Well, you passed money on. We know that.

MRS. GROSS: Did I get anything from it?

MR. SULLIVAN: Yes, you did.

MRS. GROSS: I wish I had.

MR. SULLIVAN: Well the last time you didn't. You didn't get it when Laughlin complained he was disappointed.

MR. SULLIVAN: No, Laughlin never complained to me.

MRS. GROSS: Did I get any money? Am I supposed to have gotten money?"

\*\*\*\*\*

MR. HANNON: But you're complaining?

MRS. GROSS: No, I'm not complaining. Don't mix me up, please.

MR. SULLIVAN: We don't want you mixed up, all we want is the simple unvarnished truth.

MRS. GROSS: Am I on trial or what?

MR. SULLIVAN: That is your choice.

MR. HANNON: Mr. Sullivan has indicated it is your choice. If you want to talk to a lawyer you are free to talk to the lawyer. I think that in your experience -- you're an experienced policewoman, aren't you? I should say you're in the switches."

"MR. SULLIVAN: I want to level with you. If you tell the truth about what happened you're not going to get in trouble because I'm going to tell the Grand Jury without you there is no chance of our making the case on the big fish; there is no possibility -- there is a very small possibility, but without you we can't do it.

MRS. GROSS: What's this got to do with Mr. Wallace?

MR. SULLIVAN: The accusation was made against Mr. Wallace; it was a lie; Forte made it up; we know how the story got made up. Now we know; know everything; baby's layette, pink shopping slip, the whole story; the change you kept out of that when payment was made; how much was the gift."

\*\*\*\*\*

"MR. SULLIVAN: Until I know you're on the right team --

MRS. GROSS: I don't want to be on the wrong team, believe me I don't. I was never involved criminally in anything, never, and I don't intend to start now, believe me."

\*\*\*\*\*

"MR. SULLIVAN: We have something. I'm not going to tell you if you decide to go back to Laughlin and that crowd."

\*\*\*\*\*

"MRS. GROSS: What is going to happen to Bernice?

MR. SULLIVAN: If you tell the truth you are going to be a government witness."

\*\*\*\*\*

"MR. HANNON: And possibly, as Mr. Sullivan said, if for example, you testified before the Grand Jury and lied to that Grand Jury, it might be if it saw fit that the Grand Jury could indict you for perjury."

\*\*\*\*\*

"MR. HANNON: Let me say this to you. \* \* \* As I see it, the picture as it presently stands, there is one question pending. Did you or did you not commit perjury when you testified before the grand jury. Now in the event that you did, and you know the answer to this, the next question is: is the Grand Jury going to indict you for the perjury that you committed if you did commit it."

"MR. SULLIVAN: Let me tell you this. If it came out the way I hoped it would today, and still hope it will, that you tell the truth, I would ask you to tell it to us first, and then when the Grand Jury comes back from lunch and after you have had lunch I will ask you to tell it to the Grand Jury. After that if you wanted to cooperate, and this would be strictly a voluntary thing, I would ask you to call the old man or Forte's lawyer, or both, and I would like to be listening in or have some detective listening in on the other extension, and we would have a case that would be so tight."

\*\*\*\*\*

"MRS. GROSS: \* \* \* I'm not a born liar. I don't lie. When it came -- sometimes you had to lie. I would lie to my husband if I had to and other little things, but I could never lie when it came to trial, really I couldn't. If it was for the defendant I would give them a break even if we got up on the stand; if it was the truth it was the truth. I couldn't, you know, like a lot of them, you know yourself, plant evidence. I could never do that."

\*\*\*\*\*

"MR. SULLIVAN: Jean said something about Laughlin, Jimmy Laughlin, the lawyer, saying he was disappointed in the fact that Jean did come forward and testify and for that reason you didn't get anything the last time.

MRS. GROSS: I don't know. My dealings were with the old man.

MR. SULLIVAN: Didn't Laughlin call since the trial was over, or any other lawyer?

MRS. GROSS: No, no."

\*\*\*\*\*

"MR. SULLIVAN: How about Laughlin?

MRS. GROSS: Wait a minute now. I don't remember. I really don't, whether he called or not. I really don't; I don't. I can't say for sure. I can't remember if it was after the trial or before.

\*\*\*\*\*

"MR. SULLIVAN: That's what makes some sense to her story that you called her this week and said Laughlin called you and said he was disappointed because she did come and tell the truth on the stand during the trial, and that meant you were going to get just dropped and didn't get anything."

\*\*\*\*\*

"MR. SULLIVAN: Did Laughlin know about the money passing hands?

MRS. GROSS: I don't know whether he knew -- I can't say whether he knew or not because I never got anything from him.

MR. SULLIVAN: Did Forte ever say Laughlin was in on it?

MRS. GROSS: No."

\*\*\*\*\*

"MR. SULLIVAN: Did Forte ever say whatever you do don't tell so and so about this. Did he ever name anybody you should tell, such as Laughlin or anyone else?

MRS. GROSS: No, our conversations were so vague, maybe two-faced with me; he was always in and out and when he called it was just whatever he wanted me to tell Jean and that was it.

\*\*\*\*\*

"MR. HANNON: All right, did Laughlin then call you?

MRS. GROSS: Called me one time.

\*\*\*\*\*

"MR. HANNON: Did Laughlin ever call you any other place?

MRS. GROSS: Did he ever call me?

MR. HANNON: Yes.

MRS. GROSS: I think he called me at work once or twice."

\*\*\*\*\*

"MR. HANNON: This is Laughlin telling you this, to have Mrs. Smith write a letter?

MRS. GROSS: Yes, to have her write a letter. I don't remember whether it was the first, second or third letter.

MR. HANNON: Did he ever tell you at any time to get Mrs. Smith to be evasive in her testimony or vague, not to identify Forte?

MRS. GROSS: No. He would tell me to get a letter written. No, no."

\*\*\*\*\*

"MR. HANNON: Did you ever see Jim Laughlin in Baltimore in connection with this case?

MRS. GROSS: No."

\*\*\*\*\*

"Q You never met Laughlin face to face?

A No

Q None of the money passed to you was passed by Laughlin?

A No."

\*\*\*\*\*

"Q Just before the Grand Jury then one final thing. You did say, didn't you Mrs. Gross, that since you have come forward and told the truth now you would also be agreeable to having someone listen in on your extension phone tonight should Forte call you?

A The only trouble with that is my husband doesn't know anything about this, and if somebody would have to tell him I --

Q -- I think in fairness I should advise you if this Grand Jury matter results in an indictment of anyone it is going to be public information anyway. The possibility of your husband learning is extremely great. You can think that over yourself as a practical person.

A I still would not like it in my house, I wouldn't

Q You see, we have no legal way of doing it except in your house?

A Well, I was not going to answer the phone this evening because I don't want to have any more conversations and I was going to New York today. \* \* \*."

\*\*\*\*\*

"Q Do you have any objection of making a telephone call to Mr. Forte before leaving Washington and chat with him on the phone, as well as one with James Laughlin and chat with him on the phone?"

\*\*\*\*\*

"A I would rather not.

Q I understand that you would rather not, but your cooperation --

A -- If I had to I would but if I don't have to I would rather not.

\*\*\*\*\*

"DEPUTY FOREMAN: Mr. Sullivan, I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we can. I think you can tell this witness and any other witness, in or out of this room that we'll go after him. We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.

MR. SULLIVAN: Thank you, Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?

A Okay."

\* \* \* \* \*

"Q You didn't indicate to Jean Smith at that time that you would talk to Mr. Laughlin by name?

A Never; never mentioned his name; never.

Q Was there any conversation between you and Mr. Laughlin in that fifteen minute phone call to the effect that Jean Smith would say anything about not having the abortion done by Forte? Or not have had it done by Forte?

A No."

\* \* \* \* \*

"Q Did you tell Laughlin that, too?

A No, I never told him that; no."

4. Testimony of Samuel E. Wallace before the Grand Jury March 26, 1963. Before outlining the pertinent parts of this testimony and to show how it is relevant to the matter of bias of the grand jury, some explanation is necessary. It has been demonstrated that the grand jury was to investigate alleged instances of obstruction of justice. There was included in this the allegation -- based on the sworn testimony of Dr. Forte in Criminal No. 741-61 that Officer Wallace had solicited a bribe. Of course, it goes without saying that it was assumed that it would be a good faith inquiry. Therefore, Wallace being a target of investigation it would go without saying that Wallace would have no part in

the inquiry. It is of course well known that there is no rule, ancient, medieval or modern, that permits a man to investigate himself.

Wallace to our surprise was "running errands" for Mr. Sullivan and bringing witnesses before the grand jury. Of course it was natural to assume that if Wallace could ingratiate himself before the grand jury -- and under the coaching of Mr. Sullivan -- the grand jury would soon forget about indicting him. In Wallace's testimony before the grand jury on March 26, 1963, it is apparent that Wallace was entrusted by Mr. Sullivan with an errand that should have been delegated to someone else. In fact his whole appearance on that occasion was unnecessary. In any event we now refer to the pertinent parts:

EXAMINATION ON BEHALF OF THE GOVERNMENT BY MR. SULLIVAN:

"Q Sergeant Wallace, would you state your full name for the record once more.

A Samuel E. Wallace.

Q You are the same Samuel E. Wallace who appeared before this Grand Jury?

A I did, sir.

Q And as a result of certain information which came to the attention of the United States Attorney from Mr. James J. Laughlin, did there come a time in the past several days that you checked out a story provided us by Mr. Laughlin that Jean Smith of the Baltimore area had a record or a reputation as a call-girl and prostitute?

A I did check it out.

Q Would you please tell the Grand Jury briefly what you did and the results of that check.

A I called Lieutenant Newcomer of the Baltimore State Police and he went to Baltimore, checked the Criminal Record Division there. He found that she had been charged, not in Baltimore, but in the County for drunk and disorderly on one occasion; and I believe it was in the early part of '62. That is the only record she had.

She also is a -- he did a thorough check, as far as the car and everything else. There was one point on her. She was listed as Jean Titcombe Smith, white, 130 pounds, birth --

Q Is that the Department of Motor Vehicles?

A Motor Vehicles, that's correct.

And the woman that was charged with drunk and disorderly was Jean Althea Smith. She was a white female; 145; but other things he had checked turned out to be one and the same.

As far as her husband goes, he is clean. We have his car. And that's about it.

Q Thank you, Sergeant Wallace.

A JUROR: Mr. Laughlin seems to be throwing around an awful lot of accusations.

Did you make any better check than this? Now, he had made an accusation here that she is a call-girl.

THE WITNESS: That's right.

\* \* \* \* \*

"JUROR: This man Laughlin has made a charge.

THE WITNESS: That's right."

\* \* \* \* \*

"A JUROR: We had this charge interjected into this case against this Hill woman, the same charge. I don't know what they are going to try to dig up on her. Mrs. Johnson came in here, and you know what she said. And I think in the future, on these witnesses we have had an awful lot of counter-charges here, and a lot of people make counter-charges when they are trying to cover up something against

themselves. And I think we should be awfully careful before we get into the record any aspersions or any innuendoes, because I think this Grand Jury wants to hold this testimony on a little higher standard than Jim Laughlin's concept of trying a law case. That's all I have to say."

\* \* \* \* \*

"MR. SULLIVAN: I believe the testimony that you might be thinking of is that of Bernice Gross, keeping a material witness in a hotel. And according to Mr. Laughlin's testimony, at that point, when Gross was supposed to keep the witness in the hotel, they left the hotel room and went around the block, and as a result of that activity, Mrs. Gross left the force.

That's my recollection. I don't know if there is anything in addition to that."

\* \* \* \* \*

"THE WITNESS: I called Mrs. Smith, I asked her the circumstances of the arrest. She said she is the one that She and her husband were having a family argument, and the neighbors called the police. And that's it.

A JUROR: So it's a long way from being a call-girl.

THE WITNESS: A long, long way."

We believe it is well to point out here that there is in the record in this case (page 29 proceedings April 14, 1964 - Criminal No. 600-63) where Mr. Sullivan's version is disputed. Appellant Laughlin testified as follows:

"Mr. Sullivan called me and said, 'I have information - information has come to me which I haven't been able to verify, that Jean Smith was at one time a call girl. Do you have anything to base that on?'

My reply was that I did not know Jean Smith. I never saw her until the day she appeared in court in the courtroom of Judge Tamm . . . at no time did I represent

to Mr. Sullivan that I had information to the effect that she was a call girl. It was he who made the statement. And then I said, 'Well, you have the resources at your disposal which I don't have. You have the resources of the Police Department, you have the resources of the Federal Bureau of Investigation and I would ask that you check into it.' So the version that was given to the grand jury was wholly incorrect and it did not originate with me."

Mrs. Gross appeared again before the same grand jury on March 18, 1963. We find at page 68:

"MR. SULLIVAN: Do you think that Mr. Laughlin probably had something to do with it.

MRS. GROSS: I don't think Mr. Laughlin was his attorney at the time."

At page 153 before the same grand jury we have this statement by the Deputy Foreman:

"Now we have evidence here that Forte, and I'm not going to call him a doctor, he's not a doctor -- that Forte was bribing people to get their testimony changed or refrain from giving testimony. Now are you trying to create the impression with us that Forte's doing all this; that Jim Laughlin is a perfectly innocent naive somebody that doesn't know anything about this."

Of course, it is apparent that the Deputy Foreman did not know appellant Laughlin nor did he know how he tried a law case. He also did not know Dr. Forte. As a matter of fact, Dr. Forte did have a degree in physical therapy. Therefore, the Deputy Foreman had to acquire his information from other sources in the grand jury room.

We have already alluded to the unlawful recordings. We have in mind the recordings between Mrs. Gross and appellant Laughlin - already ruled to be in violation of the Federal Communications Act. It seemed that the Assistant United States

Attorney took a special delight in playing these recordings at every opportunity before the grand jury. This is best illustrated when we refer to an incident during the course of the testimony of Joyce Johnson before the grand jury. This is the same grand jury and Joyce Johnson was a target of investigation in that it was contended that she was trying to obstruct witnesses. The record in this case contains the testimony of Joyce Johnson. The witness Johnson was testifying when the noon recess was taken. Then at page 96 we find this:

(The Grand Jury reconvened at p.m.)

"MR. SULLIVAN: While we are waiting for the witness, Mrs. Johnson, I will play this tape of the telephone conversation.

(At this point in the proceedings a tape of a telephone conversation between Bernice Gross and James J. Laughlin was played before the Grand Jury.)

MR. SULLIVAN: Now ladies and gentlemen of the Jury, you have just heard the tape which Mrs. Gross has told me outside of the Grand Jury that she made today with Mr. Laughlin, James J. Laughlin, the attorney. Now I know that the setup for this tape recording was here in the United States Court in Washington on this EKO Tape Machine, and that it was made in the presence of members of the police force of Washington here with Mrs. Gross' consent when she called Laughlin's number in Washington.

Now you will note that in that conversation you just heard, there was some reference made to the question did Gross and Smith and Laughlin meet at his office. If you recall, that question was asked specifically of Laughlin the other day when he was before this Grand Jury.

Now as I indicated to you then by the way of introduction, maybe I didn't do it specially enough. Let me emphasize it now. That there is absolutely no evidence that Laughlin, Gross, and Smith met in his office. That didn't happen so far as we know. Just

like Laughlin said, it didn't happen. But I would suppose that having asked that question, Mr. Laughlin, if he had something to hide, would suppose that we didn't know what the real truth was and that we were bluffing. That we were fishing in the dark when the question was asked of him emphatically, isn't a fact that you and Gross and Smith met in your office.

So if he did have something to hide, and if he did think we were bluffing about how much we knew about the truth, perhaps that's the reason he came forward then and made the other statements he did.

But I wanted the record to be clear and each individual to know that we are not saying that those three met here in Washington at the National Press Building.

Is it any wonder that Judge Youngdahl on two occasions said he was "shocked" when he read the statements of the Deputy Foreman and Mr. Sullivan.

FRUIT OF THE POISONOUS TREE

It is our view that the matter of the unlawful recordings set forth in the opinions of this Court (120 US App. DC 93) and the opinion of Judge Youngdahl in 222 Fed. Supl. 264 as well as Judge Curran's opinions in 223 Fed. Supl. 623 and 226 Fed. Supl. 112 formed the basis of the grand jury indictments and hence the evidence flowing therefrom are clearly the "fruit of the poisonous tree." In addition we contend the coercion of Mrs. Gross as already set forth under point 4 (Grand Jury Bias), raising as it does a constitutional question, comes under this heading. All of this we contend required that the indictment be dismissed.

VIOLATION OF CRIMINAL STATUTES BY THE GOVERNMENT

The record shows that the government in bringing about the indictments and in preparing the case for trial violated certain criminal statutes.

1. Violation of the Internal Revenue Code.

The indictments in this case were returned on July 2, 1963. There had been numerous recordings between Mr. Sullivan and Mrs. Gross. Mrs. Gross had already admitted as has been stated many acts of perjury. In addition she had admitted that some of the money she contended was given her by Dr. Forte to be turned over to Mrs. Smith had been misappropriated by her. There was a question then as to whether it should have been declared on her income tax return. Then there was the question as to whether Mrs. Smith had reported it.

It was apparent that Mr. Sullivan was coaching Mrs. Gross in her testimony to be given at the trial and was concerned as to what she would be asked on cross examination as to a so-called Christmas present in the amount of \$100. At page 446 of the proceedings we find:

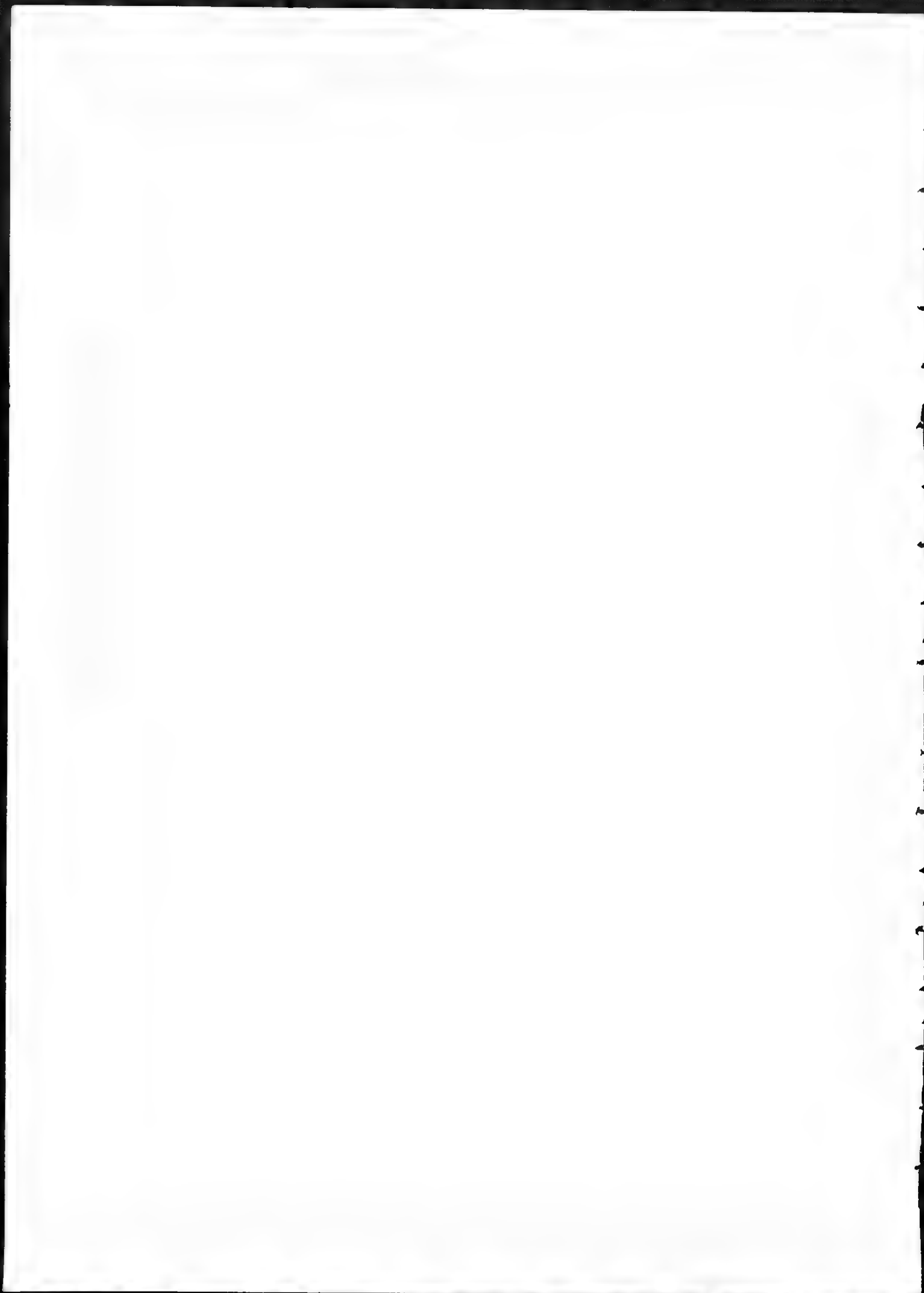
"MR. SULLIVAN: There is one thing you know about hurting in the future - there's nothing mentioned in the indictment about the hundred dollar Christmas present from Forte to you.

MRS. GROSS: Uh huh.

MR. SULLIVAN: And there was nothing mentioned --

MRS. GROSS: Uh huh.

So that the record will not be confused, we desire to point out that the proceedings before Judge Hart are made a part of the record in this case. Therefore, in the following pages when reference is made to certain page numbers it relates to the proceedings of April 21, 1964 in Criminal No. 600-63. There were a considerable number of recordings between Assistant United States Attorney Sullivan and Mrs. Gross and recordings between Mrs. Gross and Officer Wallace. These recordings were arranged by Mr. Sullivan. These recordings were made available under the Jencks Act and will be found at pages 363 to 480 of this volume.



MR. SULLIVAN: Now, question: If there is any way -- I haven't figured out how it could be done, but if there is any way the defense could say, yes, look, there is no doubt about it that money was passed -- hands, but it was -- we thought it was for an innocent purpose or some such thing.

page  
447

MR. SULLIVAN: For some innocent purpose, you know, suppose Laughlin and Forte say that. The question came up. What if Laughlin and Forte say, look, if you really got money, you're a good citizen, you must report it on your income tax, so the question would be -- next -- did you.

MR. SULLIVAN: The answer is no.

MRS. GROSS: No, because -- you know.

MR. SULLIVAN: Yes.

MRS. GROSS: And he didn't know nothing about it, so --

MR. SULLIVAN: Yes, I assume that it wasn't reported and I assume that Smith's isn't reported either.

MR. SULLIVAN: Yes.

MR. SULLIVAN: I don't know how she considered it or how she would consider it on reflection. She might not consider it a gift or maybe wouldn't consider it an income -- way you get money like that, don't talk about it as a rule, but just a question to be aware of what might possibly come.

MRS. GROSS: Why, if Forte deducted it.

MR. SULLIVAN: That is true too. He didn't. No, I checked."

This, of course, is a violation of Section 7213(2) reading as follows;

Sec. 7213

SEC. 7213. UNAUTHORIZED DISCLOSURE OF INFORMATION.

Sec. 7213(a)

(a) Income Returns -

(1) Federal Employees and Other Persons. -- It shall be unlawful for any officer or employee of the

United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

Source: Sec. 55(f)(1), 1939 Code.

## 2. Violating Secrecy of Grand Jury Proceedings.

The defendant testified before the grand jury on March 6, 1963. Within a few hours there was a recorded telephone conversation between Mr. Sullivan in Washington and Mrs. Gross wherein in violation of law Mr. Sullivan revealed grand jury testimony.

"MR. SULLIVAN: I expect that there's at least a possibility that Laughlin might call you tonight.

. . . . .

MR. SULLIVAN: Well, he may possibly call because he's before the grand jury today.

MRS. GROSS: He was.

MR. SULLIVAN: And he doesn't know any Bernice Gross."

And to show that there was a clear purpose to reveal grand jury testimony (since there was no other way in which Mrs. Gross knew what had taken place before the grand jury) we find this:

"MR. SULLIVAN: . . so I assumed he was trying to camouflage to the grand jury . . I did say this to him so he would think that I was trying to bluff him. I said 'If I told you Jean Smith that Bernice Gross and Jean Smith and you met this week in the National Press Building, what would you say about that?' and he said 'Oh, that is a terrible lie.' So he assumed then that I was bluffing."\*

and continuing to reveal grand jury testimony:

"MR. SULLIVAN: . . I also bore down on Lorraine and I said you know . . if I told you that Bernice said that Lorraine knew Bernice Gross and so on and so on . . . "\*\*

\* Page 386 Proceedings April 21, 1964 Criminal No. 600-63  
 \*\* Page 392 " " " "

Of course, revealing grand jury testimony is a violation of Rule 6(e) Federal Rules of Criminal Procedure reading as follows:

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

It would seem to us that Rule 6(e) Rules of Criminal Procedure has the force of statute. It of course has no validity if the prosecutor can do what was done in this case.

### 3. Unlawful recordings.

We have already referred to the unlawful recordings (120 US App. DC 93). However, there were other unlawful recordings. We have particularly in mind the recording made in Mrs. Gross' bedroom - arranged by Mr. Sullivan. This was a recording between Mrs. Gross and Officer Wallace without the consent of either. It is apparent that Mrs. Gross was unaware of what was taking place. Mr. Sullivan had his recording apparatus with him and of course Mrs. Gross being under coercion had no choice in the matter. Her consent was not a voluntary one. Officer Wallace did not know that it was being recorded. Neither Mrs. Gross nor Officer Wallace consented to the divulgence. All of this violated the Federal Communications Act reading as follows:

SECTION 605, TITLE 47, provides:

§605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or

for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title Vi, §605, 48 Stat. 1103.

Section 501, Title 47, United States Code provides:

SUBCHAPTER V. PENAL PROVISIONS: FORFEITURES

§501. General penalty

Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided in this chapter, by a fine of not more than \$10,000 or by imprisonment for a term not exceeding one year, or both; except that any person, having been once convicted of an offense punishable under this section, who is subsequently convicted of violating any provision of this chapter punishable under this section, shall be punished by a fine of not more than \$10,000 or by imprisonment for a term not exceeding two years or both.

The recorded conversation between Mr. Sullivan and Mrs. Gross is found at pages 447 and 448, April 21, 1964, Criminal No. 600-63.

COERCION OF MRS. GROSS

We believe that the testimony of Mrs. Gross and the circumstances surrounding her testimony -- before and after -- show that it goes beyond the area of credibility and violated the due process clause.

In our judgment this is covered in our point 4 (Bias of the Grand Jury). There is also a part of this record, more than fifty telephone slips, reflecting telephone calls between Mrs. Gross and Mr. Sullivan. The record also reflects many recorded telephone recordings between Mrs. Gross and Mr. Sullivan.

As we have stated in the brief, this question has not yet been passed upon by the Supreme Court or the lower Federal Courts. However, in United States v. Wolfe, 307 Fed(2nd) 798 CCA 7 (1962) it was conceded that the constitutional issue may well arise.

The Court said:

"We are not unmindful that a case might well arise where the procurement of evidence to be used in a federal prosecution might have been obtained by proved coercion violative of the constitutional rights of a witness and that a serious question might arise in that event upon the use of such evidence upon the trial of defendant. However such a case is not before us now."

We have already cited in our brief 57 Northwestern University Law Review 549 - Coercion of Witnesses. The author's conclusion is interesting:

"Court integrity and public support for the legal process are not preserved by formalistic rules that prevent the admission of one type of evidence while admitting another equally tainted. These ends will be achieved only when the police understand that the fruits of their misconduct whether tangible evidence or testimony, will not be admitted into the courts, whether those acts violate the rights of the man on trial or of another."

If this situation is placed in its true perspective, we believe our reasoning cannot be disputed. Assume for the purpose that the government attempted -- even now -- to indict Gross for perjury would anyone seriously contend that her admission in Mr. Hannon's office or before the grand jury for that matter could be received in evidence against her? Clearly there could be no doubt that the manner of the interrogation -- the threats of perjury -- and the absence of counsel would all add up to a violation of her constitutional rights. Therefore, it would seem to follow that since her testimony was subject to the constitutional infirmity could it be used against appellants. We can, of course, assert this constitutional privilege in another. See *People v. Albea*, 2 Ill(2nd) 317.

VIOLATION OF THE JENCKS ACT

There was a telephone recording made at the direction of Mr. Sullivan from the home of Mrs. Gross in Baltimore between Mrs. Gross and Mr. Wallace. It was without the consent of either. Neither party consented to the divulgence of it. Since the government had the advantage of it in the preparation for trial, it was our view that under the Jencks act we were entitled to use the contents for cross examination. We were denied that right. It is found at pages 364 to 378, April 21, 1964 - Criminal No. 600-63. Here are some excerpts:

"GROSS: Why in the hell they do that with Jean Smith?"

"GROSS: Did you know I was in on it before."

"GROSS: Sullivan dreamed it up."

"GROSS: I don't trust any of them - none of you."

"GROSS: You're better keeping your nose out of it."

"GROSS: He's a lot of crap."

"GROSS TO WALLACE: Listen are they on to you at all."

"GROSS: I am sitting here on a keg of dynamite."

PUBLIC POLICY

We believe the whole history of this case shows a flagrant violation of the rights of the accused. We cannot believe that our public policy will permit the following:

After a witness testifies before a grand jury and the prosecuting authorities are not satisfied with her responses, can the witness then without benefit of counsel be subjected to intensive interrogation in an unfriendly atmosphere.

Can such a witness be subjected to constant threats of a perjury indictment in an effort to overcome her will.

Can such a witness be required to engage in recorded telephone conversations against her will.

After a witness has freely admitted many acts of perjury can the prosecution consistent with public policy place her on the witness stand as a reliable witness.

After a witness has freely admitted many acts of perjury can the prosecuting officials consistent with public policy continue to permit her to return to the grand jury room to "correct" her testimony.

Does our public policy permit the prosecuting officers to inflame a grand jury against a defendant.

Does our public policy permit prosecuting and police officers to practice deceit upon a prospective witness and use such deceit to bring about a grand jury indictment.

FUNDAMENTAL FAIRNESS

In many respects this point is closely allied with our point under public policy. However, certain other references are in order. It will be seen that Mrs. Gross had admitted many acts of perjury. She was then permitted to return to the grand jury to "correct" her testimony. It was then found out that she had committed more acts of perjury. She was then again permitted to return to the grand jury to "correct" her later testimony. It was then determined that she had committed more acts of perjury and she was then permitted to go back before the grand jury and "correct" her additional testimony. No such right was accorded the appellants.

As to fundamental fairness we desire to point out that Gross was forced to make telephone recordings on March 1, 1963. It was then known that appellants would appear on March 6, 1963. This was, of course, entrapment.

Is it due process to permit an Assistant United States Attorney to engage an attorney in conversation and then, unknown to the attorney, record such conversation.

Is it a matter of fundamental fairness to coach a witness for the prosecution and suggest to her how she may overcome what would possibly be damaging evidence against her.

The favoritism shown Officer Wallace passes beyond the line of tolerable imperfectio and falls into the line of fundamental unfairness. Let us search the record briefly:

The statement was made that the grand jury was to investigate the accusation against Wallace.

Mr. Sullivan makes the statement that the accusation against Wallace was a lie. Forte made it up.  
Page 9 Interrogation in Mr. Hannon's office.

On April 15, 1964, Mr. Sullivan testified under oath:

"MR. LAUGHLIN: You recall, of course, that certain accusations were made against Officer Wallace.

MR. SULLIVAN: I recall Dr. Forte making those accusations.

MR. LAUGHLIN: And you, of course, you don't know whether those charges were true or false do you.

MR. SULLIVAN: I still do not know sir."

On the same day under oath Mr. Sullivan testified:

"MR. GARBER: And this investigation was started because of the bribery accusation, isn't that correct.

MR. SULLIVAN: It was started for that and other reasons sir."

And yet in Mr. Hannon's office at page 14 we find this:

"MR. SULLIVAN: Over here on the force there is no one with a straighter reputation than Wallace."

This was, of course, prejudging the investigation, and therefore by prejudging the case it is difficult to see how there could be an objective inquiry. There can be no doubt that Mr. Sullivan had ample grounds to investigate Wallace. Let us refer to the record. When Mrs. Smith was called before the grand jury on March 1, 1963, at page 14 of her appearance on March 1, 1963 Mr. Sullivan was questioning her as to persons in Washington who had been paid off and he had particular reference to the police force or the United States Attorney's office.

This had to do with information given to Mrs. Smith by Mrs. Gross. Mrs. Smith then said:

"SMITH: Mr. Wallace.

SULLIVAN: Mr. Wallace.

SMITH: Yes.

SULLIVAN: What did she say about Mr. Wallace?

SMITH: That he had been paid off.

SULLIVAN: And references to any other member of the police force?

SMITH: No."

Mrs. Smith also testified on April 16, 1964 in Criminal 600-63 as follows:

"MR. LAUGHLIN: Did she (Mrs. Gross) ever tell you that Wallace was paid off?

MRS. SMITH: Yes.

MR. LAUGHLIN: All right, on how many occasions?

MRS. SMITH: Quite a few

MR. LAUGHLIN: All right, and paid off in Baltimore or here or where?

MRS. SMITH: She didn't say."

This, of course, is significant because Mrs. Smith received this information from Mrs. Gross long before the defendant came into this case. In view of the testimony of Mrs. Smith before the grand jury, it would have been reasonable to assume that Mr. Sullivan would follow through and endeavor to ascertain where Mrs. Gross received her information about Wallace. It is particularly significant when the record shows (page 270

Criminal No. 600-63 April 15, 1964) Mr. Sullivan testified under oath:

"Mrs. Birge had stated too that Wallace had offered her money for perjured testimony and that was one of the factors."

The matter of fundamental fairness comes into play again when we examine some of the excerpts from the recordings between Mr. Sullivan and Mrs. Gross:

Page 425 (April 21, 1964) Criminal No. 600-63

"MRS. GROSS: And you got something you can't . . . you'd make an ass out of yourself.

MR. SULLIVAN: Actually we could - secrecy.

MRS. GROSS: You know it had to be kept secret."

Mr. Sullivan in referring to appellant Laughlin:

"He's an old bear." - Page 435

"Big bluff on the outside." - Page 417

"He is ruthless." - Page 391

That Mr. Sullivan was elated at the return of the indictments is shown in the following from the recordings:

"MR. SULLIVAN: I'm happy at the way it developed. Sure I'm happy there is no doubt about it, it would be silly to say I wasn't happy."

"MR. SULLIVAN: Very little publicity compared to what we expected." Page 432

"MR. SULLIVAN: All statements have to be cleared presumably through me. Will be on the news tonight."

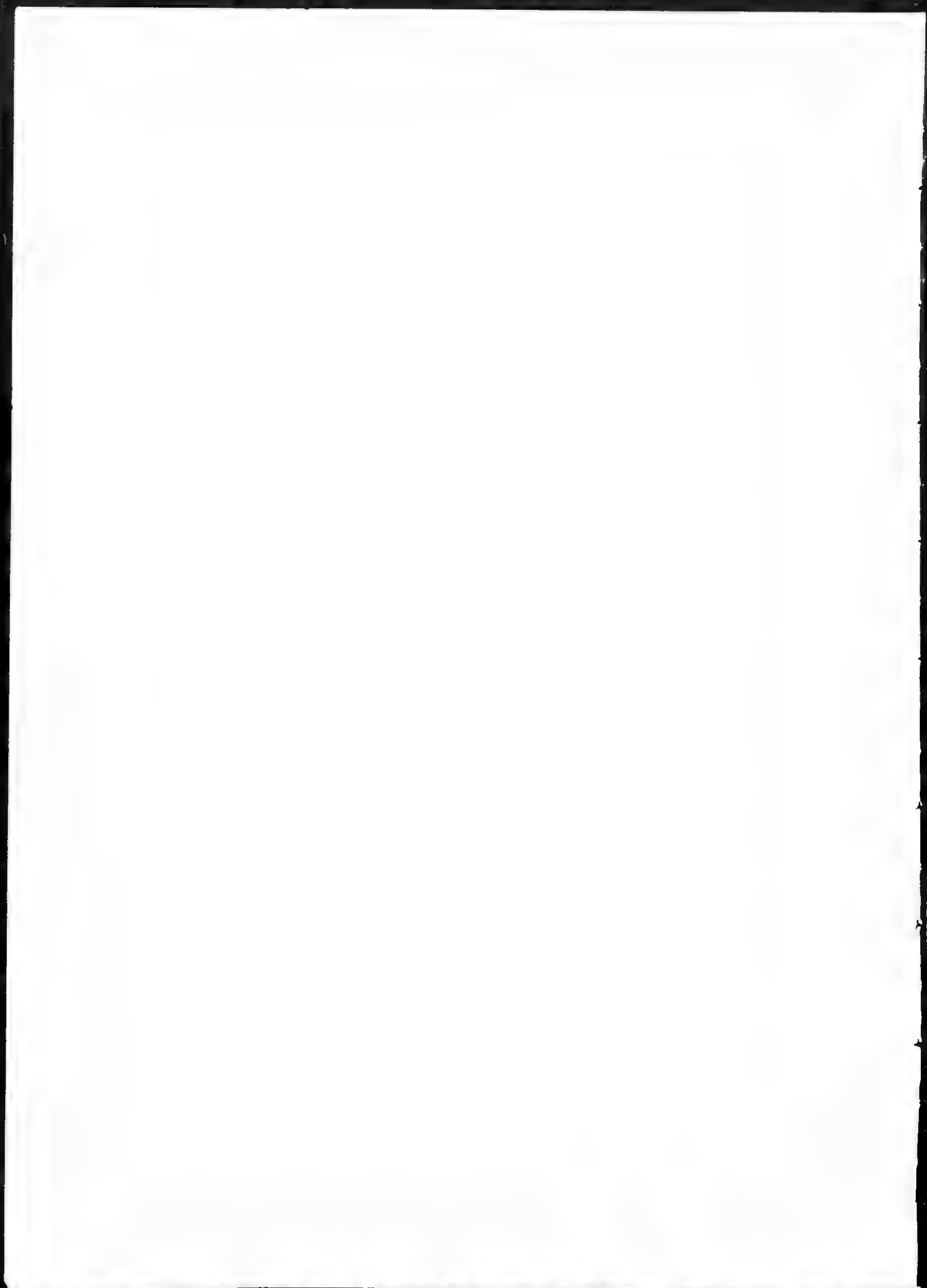
It is also significant that Mrs. Gross and Mr. Sullivan were on a first name basis. She called him "Harold" and he called her "Bernice". The record also shows that to save her

the expense of transportation he would have Officer Wallace call for her in a police cruiser and return her to Baltimore.

In our judgment the matter of fundamental fairness was lacking in the trial and it fatally infected the proceedings.

CONSPIRACY

We concede that the appellee may raise the question that this point can only be argued if we have the benefit of the stenographic transcript. However the conspiracy in the main depends upon the testimony of Mrs. Gross. Her testimony, a part of the record in this case in 600-63, April, 1964, is almost identical with her testimony in 1965. Regardless of her testimony we raise the question as to the coercion of Mrs. Gross and the circumstances of her interrogation in the office of Mr. Hannon. Considering her many acts of perjury, we do not see how her testimony could in good conscience sustain a charge of conspiracy.



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

v. : Criminal No. 600-63

ALLAN U. FORTE, Et al :

MOTION TO DISMISS THE INDICTMENT

Now come the defendants and move the Court for an order dismissing the indictment in this cause for the reason that the United States Attorney and his assistants have abused grand jury process in bringing the witness Bernice Gross before a grand jury in March 1964. Defendants say that the purpose of the appearance of the said Gross before the March 1964 grand jury constituted a dress rehearsal inasmuch as the questions propounded to her were the same questions propounded to the said Gross in March of 1963 and in a certain proceeding before Judge Youngdahl in October 1963. The Federal Rules of Criminal Procedure clearly set forth the outline and scope of discovery proceedings.

We ask, therefore, that there be a full and complete hearing in this cause with testimony taken to determine the facts and if it is found that the grand jury process was not used for a proper purpose, that the indictment should be dismissed. Attention of the Court has been called to the recent opinion of the Second Circuit in United States v. Dardy.

/s/ William J. Garber  
William J. Garber  
Counsel for Defendant  
James J. Laughlin

/s/ James J. Laughlin  
James J. Laughlin  
Counsel for Defendant  
Allan U. Forte

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :  
v. : Criminal Case No. 600-63  
JAMES J. LAUGHLIN :  
and :  
ALLAN U. FORTE :

DEFENDANTS' INSTRUCTION No. 1

To find the defendants guilty of the conspiracy charge in Count 1, the Government must prove beyond a reasonable doubt that it was a part of the conspiracy that the defendants Allan U. Forte and James J. Laughlin did unlawfully, willfully and knowingly conspire, combine, confederate, and agree together, and with each other, and with one Bernice Gross, a co-conspirator but not made a defendant herein, and with other co-conspirators unknown, to defraud the United States and to violate the following sections of the United States Code:

Section 1503, Title 18 (Influencing Witnesses);  
Section 1621, Title 18 (Perjury);  
Section 1622, Title 18 (Subornation of Perjury)

and the Government must also prove beyond a reasonable doubt that the said defendants Allan U. Forte and James J. Laughlin, Bernice Gross and others, did corruptly endeavor to influence Jean Smith by counseling, advising, suggesting, and persuading her to induce the Government to abandon prosecution and, if prosecution were not abandoned, then to absent herself from the said proceeding and trial and, if she did not absent herself,

then, to testify falsely to the aforesaid matters at the said trial in United States v. Allan U. Forte, Criminal No. 741-61.

DEFENDANTS' INSTRUCTION No. 2

A mere meeting between the defendants cannot be construed as the beginning of a conspiratorial relationship.

DEFENDANTS' INSTRUCTION No. 3

In other words, in considering whether or not one or both defendants on trial was or were members of the conspiracy charged, you must do so without regard to, and independently of, the statements, acts and declarations of others in his absence.

DEFENDANTS' INSTRUCTION No. 4

Mere association or acquaintanceship of one defendant with another does not establish the existence of a conspiracy.

DEFENDANTS' INSTRUCTION No. 5

Mere association of one of the defendants with the other defendant, or a co-conspirator, does not establish the existence of the conspiracy or the participation of either or both therein.

DEFENDANTS' INSTRUCTION No. 6

The Government must prove beyond a reasonable doubt that the purpose of the conspiracy was to obstruct the due administration of justice in connection with an investigation pending before a Federal grand jury in this district.

DEFENDANTS' INSTRUCTION No. 7

There are a number of steps which you must follow in order to determine whether one or both of the defendants were members of a conspiracy. First, you must find that there was a conspiracy. A conspiracy has been defined as a corrupt agreement or a partnership in crime. Second, you must consider all the evidence directly relating to each defendant in order to determine whether he was a member of such a conspiracy. In determining whether he was a member or not you cannot consider any conversations which were had when he was not present. In determining whether he was a member you cannot consider any acts done by others in his absence. Third, only if you find beyond a reasonable doubt that a conspiracy existed, and that one or both of the defendants were members of this conspiracy can you consider conversations of and acts done by the defendant or defendants whom you find to be a member or members of the conspiracy or alleged co-conspirators against such absent defendant.

DEFENDANTS' INSTRUCTION No. 8

The jury is instructed that in determining whether the defendant Laughlin was a member of the conspiracy, if in fact you find such a conspiracy existed, you are instructed as a matter of law that his membership in the alleged conspiracy cannot be proved against him by evidence consisting of only the conduct and statements of his alleged co-conspirators, Gross and Forte, in his absence, and if you have a reasonable doubt about

this you must give the benefit of this doubt to the defendant and find him not guilty on this count.

DEFENDANTS' INSTRUCTION No. 9

I want to caution you that mere association with one or more conspirators does not make one a member of the conspiracy. Nor is knowledge of the conspiracy, without participation therein, sufficient to constitute membership. What is necessary is that a defendant knowingly participate with knowledge of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful ends and if you have a reasonable doubt from all the evidence as to whether the Government has established all of these matters, then the Government would not have sustained its burden of proving that defendant was a knowing member of a conspiracy and it would be your duty to find him not guilty on that count.

DEFENDANTS' INSTRUCTION No. 10

The jury is instructed that individuals, including the defendants, associated with each other by personal meetings, by telephone conversations and written communications does not in and of itself establish their participation in a criminal conspiracy.

To establish participation in a criminal conspiracy it is necessary to prove beyond a reasonable doubt that the particular defendant knowingly and willfully joined in a criminal partnership and that the illegal and criminal purpose of that partnership was known by him and agreed to by him and that he intended to further that purpose.

Even if you find that a criminal conspiracy existed, you must still determine whether each defendant willfully participated in it. It is not enough merely to find that any of the acts of that defendant furthered the object of the alleged conspiracy. If the defendant unwittingly served as a means to accomplish the object of the unlawful agreement or, with respect to the defendant Laughlin in properly representing his client some of his acts may have unknown to Mr. Laughlin furthered the objects of the conspiracy, that would be insufficient to convict the defendant and you would be required to acquit him on the conspiracy count and if you have a reasonable doubt about it, you would have to give him the benefit of that doubt and find him not guilty.

DEFENDANTS' INSTRUCTION No. 11

To find either defendant guilty of conspiracy you must find that he actively participated therein. Mere knowledge of an illegal act on the part of a co-conspirator is insufficient. Mere association of one defendant with another does not establish the existence of a conspiracy.

DEFENDANTS' INSTRUCTION No. 12

You are instructed that if you find that every circumstance relied upon as incriminating is susceptible of two interpretations, each of which appears to be reasonable, and one of which points to a defendant's guilt, the other to his innocence, it is your duty to accept that of innocence and reject that which points to guilt.

DEFENDANTS' INSTRUCTION No. 13

You are instructed that any admission made by the co-conspirator Gross on or after March 1, 1963 can be considered by you only in connection with the participation of the co-conspirator Gross and cannot be used against the defendant Laughlin.

In this connection it is necessary to instruct you as to why such an admission against interest made by a conspirator or co-conspirator cannot be used against the others. It is as the law describes it, an admission against interest which a person ordinarily would not make. However, if such a person after the termination of the conspiracy and his or her appearance before a grand jury implicates other defendants or conspirators in such admission, it is not evidence against the others because as to the other defendants it would be nothing more than hearsay evidence.

Delli Paoli v. United States

352 U.S. 232; 77 S.Ct., 294.

DEFENDANTS' INSTRUCTION No. 14

You are further instructed that the Government has the burden of proving beyond a reasonable doubt that the defendant joined the overall conspiracy charged in the indictment with knowledge of its common, unlawful objective and with the specific intention to assist the conspiracy to achieve its wrongful goal. Where a defendant associates with persons engaged in conspiracy that association per se, by and of itself, does not make a defendant a co-conspirator. Even if the defendant participates in a single isolated illegal transaction with persons who are engaged in a conspiracy, that participation per se, by and of itself, does not make the defendant a co-conspirator. Therefore, after viewing all of the evidence you find that the defendant Laughlin did not knowingly participate in a conspiracy to obstruct justice or if you find that his participation was limited in this case in advising the admitted co-conspirator Gross about the contents of a certain letter, that would be insufficient to denominate the defendant a conspirator and you would be required to find him not guilty on that count.

DEFENDANTS' INSTRUCTION No. 15

The jury is instructed that all evidence of an admitted perjurer should be considered with caution and weighed with great care.

DEFENDANTS' INSTRUCTION No. 16

The jury is instructed that if and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made outside of court by one person may not be considered as evidence against any person who was not present and heard the statement made.

DEFENDANTS' INSTRUCTION No. 17

In connection with the testimony of the witness Bernice Gross, you are instructed that she has testified that she was interrogated for several hours in the office of Assistant United States Attorney Hannon and that she was fearful that if she did not cooperate with the United States Attorney she would be indicted for perjury. Therefore, it is for you to consider whether the testimony of the said Gross, in view of her testimony on the stand in this case, is entitled to any credence whatsoever.

DEFENDANTS' INSTRUCTION No. 18

You are instructed of course that it is essential that the Government prove each and every allegation in the indictment.

DEFENDANTS' INSTRUCTION No. 19

You are instructed that an attorney on behalf of a defendant not only has the right but it is his plain duty toward his client to fully investigate the case and to interview and examine as many as possible of the witnesses involved who could assist him in ascertaining the truth concerning the event in controversy. Witnesses are not parties, and should not be partisan. They do not belong to either side of the controversy. They may be summoned by one or the other or by both but are not retained by either. It would be a most unfortunate condition of affairs if a party to a suit, civil or criminal, should be permitted to monopolize the sources of evidence applicable to the case to use or not as might be deemed most advantageous.

The defendant James J. Laughlin as attorney for the defendant Allan U. Forte was under duty and obligation to properly investigate the facts and to interview any and all persons who might have any knowledge or could shed any light on the allegations in the indictment.

DEFENDANTS' INSTRUCTION No. 20

You are instructed that if an attorney does not properly investigate the case and does not adequately represent his client he may run the risk of condemnation by an appellate court or criticism or disciplinary action by the trial court.

DEFENDANTS' INSTRUCTION No. 21

You are instructed that there is on the statute books a provision known as Section 2255 of the New Judicial Code. This section permits an accused, if convicted, to petition the Court for relief if he contends that his constitutional rights were violated. The accused, of course, under our system of Government is entitled to effective assistance of counsel. If an accused makes an accusation that he did not have effective assistance of counsel due to inaction or carelessness on the part of his counsel, the Court can order a hearing and at such hearing the attorney could be required to testify. Therefore, it is necessary that an attorney for a defendant be always alert to make certain that the constitutional rights of his client are fully protected.

DEFENDANTS' INSTRUCTION No. 22

The defendants Allan U. Forte and James J. Laughlin are accused of conspiring to violate Section 371 of the United States Code. In other words, the Government maintains that they conspired to obstruct the due administration of justice. The Government must prove beyond a reasonable

doubt that the defendants Allan U. Forte and James J. Laughlin conspired to obstruct the due administration of justice, and if you have a reasonable doubt about this you must give the benefit of this doubt to the defendants and find them not guilty.

DEFENDANTS' INSTRUCTION No. 23

The jury is instructed that there has been testimony in this case that the witness Smith did not wish to come to Court in the case involving the defendant Allan U. Forte and that she communicated said thoughts to a Bernice Gross. There has also been testimony in the case from the alleged co-conspirator Gross that the defendant Laughlin suggested certain matters that could be put in a letter to the United States Attorney suggesting that the said Smith did not wish to appear as a witness. This testimony was received with relationship to Count 1.

The jury is instructed that Mrs. Smith, as the complaining witness, had the right to communicate her desire not to testify to the United States Attorney and Mr. Laughlin, as attorney for the defendant Forte, had the right and duty to advise said witness that she could communicate her views to the United States Attorney and that she could do so by letter and that this advice, standing alone, would not constitute any offense by the defendant Laughlin. The jury is instructed the Government would have to go further and would have to prove beyond a reasonable doubt that Mr. Laughlin did give advice with a corrupt intent as this Court has defined

that term to you, and if from all the evidence you believe that Mr. Laughlin advised the complaining witness through Gross about the writing of a letter to the United States Attorney but he did so in the representation of his client and that he was exercising his right to advise the complaining witness that she could communicate her views to the United States Attorney and did so without any criminal intent or corrupt motive, then you would have to find the defendant Laughlin not guilty and if you have a reasonable doubt about this you would have to give him the benefit of that doubt and find him not guilty.

Rosner v. United States  
2nd Circuit  
10 F.2d 675

Harrington v. United States  
8th Circuit  
267 Fed. 97

DEFENDANTS' INSTRUCTION No. 24

You are instructed that the indictment also charges that the defendants Allan U. Forte and James J. Laughlin, Bernice Gross and other co-conspirators, did endeavor to corruptly influence one Dorothy Birge by counseling, advising, suggesting, and persuading her to testify falsely to the matters set forth in Criminal Case No. 741-61, United States v. Allan U. Forte, terminating in an acquittal February 20, 1963, wherein Jean Smith was the complaining witness.

Before you could convict in this case you would have to believe beyond a reasonable doubt that the defendants Allan U. Forte and James J. Laughlin and Bernice Gross and other co-conspirators did corruptly endeavor to influence the said Dorothy Birge by counseling, advising, suggesting, and persuading her to testify falsely in Criminal No. 471-61, United States v. Allan U. Forte, terminating in an acquittal February 20, 1963. If you have a reasonable doubt about this you must give the benefit of that doubt to the defendants and acquit them.

DEFENDANTS' INSTRUCTION No. 25

You are instructed that in this case Bernice Gross has admitted under oath that she has committed many, many acts of perjury. You are instructed that in view of this you have the right to completely disregard all of her testimony.

Arbuckle v. United States  
79 U.S. App. D.C. 282, at p. 284.

DEFENDANTS' INSTRUCTION No. 26

You are instructed as a matter of law that the burden of proof is always upon the prosecution. It is not sufficient to establish a probability though a strong one, arising from the doctrine of chance, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact beyond a reasonable doubt.

McAffee v. United States  
70 App. D.C. 142 at p. 151.

DEFENDANTS' INSTRUCTION No. 27

You are instructed that specific criminal intent must exist in order for there to be a violation of Section 1503, Title 18, United States Code (Obstruction of Justice) and such specific criminal intent must be to do some act which tends to influence, obstruct or impede due administration of justice and must be done with corrupt motive and if you have a reasonable doubt as to whether the Government has proven beyond a reasonable doubt this specific criminal intent and this corrupt motive and if you have a reasonable doubt as to whether the Government has sustained its burden of proof as to such specific criminal intent or corrupt motive, you must give the benefit of that doubt to the defendants and acquit them.

Knight v. United States  
310 F.2d 305.

DEFENDANTS' INSTRUCTION No. 28

You are instructed that the Government has failed to call as a witness one Samuel E. Wallace, a police officer of the District of Columbia, who played a major part in the investigation of this case. Since the said Wallace was peculiarly available to the Government you have a right to infer that the testimony of the said Wallace, if called, would have been unfavorable to the Government.

DEFENDANTS' INSTRUCTION No. 29

You are instructed that a reasonable doubt may arise from the evidence in the case and you are also instructed that a reasonable doubt may arise from lack of evidence.

DEFENDANTS' INSTRUCTION No. 30

You have already been instructed that the witness Bernice Gross by her own testimony had admitted that she committed various acts of perjury and that when she made the answers under oath she knew the answers were intentionally false. You are further instructed that the witness Bernice Gross is an accomplice and that her testimony must be received with the very greatest care and caution and should be scrutinized by you very fully and you are instructed that you are to look for corroborating testimony before giving credence to the testimony of the said Bernice Gross.

Caminetti v. United States  
242 US 470

DEFENDANTS' INSTRUCTION No. 31

You are instructed that the witness Bernice Gross by her own testimony is an accomplice. However you are instructed that her testimony should be received with suspicion and with the greatest care and caution.

Egan v. United States  
52 App. DC 384

Freed v. United States  
49 App. DC 392

DEFENDANTS' INSTRUCTION No. 32

You are instructed that the witness Gross has testified that after she appeared before the grand jury the first time on March 1, 1963, she was taken to the United States Attorney's office and interrogated for more than two hours and at the end of the interrogation she agreed to cooperate with the Government. You, therefore, may take this factor into consideration in determining the weight to be given her testimony.

DEFENDANTS' INSTRUCTION No. 33

You are instructed that there has been testimony in this case that Detective Samuel E. Wallace has solicited the defendant Forte for a bribe and there is further testimony to the effect that the witness Gross stated that Officer Wallace had been paid off on one or more occasions in Baltimore. You are instructed that Officer Wallace is not on trial but you may take this testimony into consideration in determining the weight to be given to the testimony of the witness Gross.

DEFENDANTS' INSTRUCTION No. 34

You are instructed that the witness Bernice Gross by her own testimony is an accomplice in the alleged offenses named in the indictment and it is the law that you may convict upon the uncorroborated testimony of an accomplice, but I caution you that her testimony should be scrutinized with the greatest care and caution and you should look for corroboration as to material aspects of her testimony.

DEFENDANTS' INSTRUCTION No. 35

In connection with Forte's criminal record you are further instructed that in evaluating such criminal record as affecting Forte's credibility you may also consider the explanation given by Forte on the witness stand attenuating such conviction, including the testimony that Forte had received a pardon from the Governor of the State where the conviction was had.

DEFENDANTS' INSTRUCTION No. 36

You are instructed that Forte has testified that his relationship with the witness Gross was instigated by Gross and the purpose of their meetings and telephone conversations was for Gross to supply Forte with information concerning one Samuel E. Wallace and that money was given by Forte to Gross for the purpose of covering Gross' expenses and to pay for the information concerning Wallace. If the jury believes the testimony of Forte or if the jury has any reasonable doubt concerning the matters about which Forte testified then the jury must return a verdict of not guilty as to Forte. In other words if the jury believe that Forte was not a party to any conspiracy and did not either directly or indirectly attempt to influence the witness Jean Smith as alleged in the indictment or if the jury has any reasonable doubt as to these matters then the jury must return a verdict of not guilty as to Forte.

CHARGE TO THE JURY

Transcript of Proceedings

20th DAY

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

|                   |   |                     |
|-------------------|---|---------------------|
| UNITED STATES     | ) |                     |
|                   | ) |                     |
| v.                | ) | Criminal No. 600-63 |
|                   | ) |                     |
| ALLAN U. FORTE    | ) |                     |
| JAMES J. LAUGHLIN | ) |                     |

Washington, D. C.

Tuesday, June 29, 1965

Before the Honorable WILLIAM B. JONES, United States  
District Judge, the trial was resumed at 10:08 a.m. today.

## Appearances:

For the United States:

Mr. JOSEPH A. LOWTHER

For the defendant Forte:

Mr. WILLIAM J. GARBER

For the defendant Laughlin:

Pro se

- - -

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## -- PROCEEDINGS --

(The jury is in the box.)

## JUDGE'S CHARGE TO THE JURY

THE COURT. Ladies and gentlemen of the jury, this case has now reached that stage where it becomes my duty to charge you on the law of the case, which charge you are required to follow in exercising your duty to pass on the facts in this case. Before going to the principles of law which must guide you in your deliberations, I want to discuss very briefly the participants in this trial and the functions which each of us has in this case. First consider counsel for the Government and counsel for the defendant, and also the defendant Laughlin. You first met them in the voir dire examination when you were selected as jurors. Subsequently the Government's counsel made an opening statement as to what the Government expected to prove, and then the defendant Laughlin made an opening statement as to what he, the defendant Laughlin, expected to prove. Those statements of what counsel for the Government and defendant Laughlin expected to prove do not constitute evidence in this case.

At the close of the case, counsel for the Government, counsel for the defendant Forte and the defendant Laughlin made what we refer to as summations to the jury. They of course did not undertake to discuss all of the evidence in the case; but they did discuss the evidence that con-

2303     stituted their recollection of that part of the evidence to which they thought you should give special consideration. If your recollection

disagrees with their recollection, your recollection is controlling, as you are the sole judges of the issues of fact.

During the course of the trial there were occasions when there were colloquies between counsel, and between counsel and the Court, in connection with which there may have been statements of alleged fact. Quite obviously these statements do not constitute evidence. When I use the word "counsel" I of course speak of Government counsel and Mr. Garber, counsel for the defendant Forte, and also Mr. Laughlin who is defending himself.

Now we come to the function of the Court. It is my duty to conduct the trial of the case in an orderly, fair and efficient manner, to rule upon questions of law during the course of the trial, and finally to charge you with respect to the law which will control you in the determination of the issues of fact which you have to decide. You are not to draw any inferences, nor are you to be influenced with respect to the guilt or innocence of either defendant, by any ruling of this Court during the course of the trial. The Court has made rulings of law and thereby disposed of the questions that were presented, either dealing with the admissibility  
2304 or inadmissibility of evidence, or other questions that arose during the course of the trial. There is nothing that the Court has said during the course of the trial, or that will be said during this charge, which should carry with it any suggestion as to how the Court feels this case should be decided, because, as I shall point out to you momentarily, you are the

sole judges of the issues of fact in this case, and for me to suggest how you should decide the case would constitute an assumption of your prerogative in this case.

As I said, you are the sole judges of the issues of fact, which you must decide in this case. You must base your judgment upon the evidence which you have heard from the witness stand, the exhibits which have been received in evidence, and any stipulations which may have been made by counsel during the course of the trial, and the inferences which are reasonably deducible from that evidence, that is to say, the testimony, exhibits and stipulations.

I repeat, you are the sole judges of the issues of fact. That is your sole responsibility, and no one else can share it with you.

You must weigh and consider this case without regard to sympathy, prejudice or passion, for or against any party to the action. And although you are the sole judges of the facts, you are duty bound to follow  
2305 the law as I shall now state it to you. You are to apply the law to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but you are to consider as a whole the instructions in this charge.

These defendants have been indicted and charged with conspiracy and with obstruction of justice. A little later on I shall read the indictment to you, but at this time I wish to say and emphasize that the fact of their indictment raises no inference of guilt. The indictment is a method whereby

a defendant is brought to trial and by which he is informed of the charges against him. It is not evidence in the case.

Every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to each defendant in this case throughout the trial. The burden is on the Government to prove a defendant guilty beyond a reasonable doubt, as to every element of the offense, as those elements will be defined; and if the Government fails to sustain that burden, then you must find the defendants not guilty.

You may well ask what is meant by the phrase, "a reasonable doubt." It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty, and not necessarily proof to a mathematical certainty. A reasonable doubt is one which is reasonable  
2306 in view of all the evidence. Therefore, if after an impartial comparison and consideration of all the evidence you can candidly say that you have such a doubt as would cause you to hesitate to act in matters of importance to yourselves, then you have a reasonable doubt. But if after such impartial comparison and consideration of all the evidence, and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would not hesitate to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt.

That is an instruction concerning the burden of proof and reasonable doubt. It goes to each defendant separately.

In courts as well as in all of our affairs of life, when we are called upon to determine disputed questions of fact, there are two kinds of evidence upon which our conclusions may be based. One kind is called direct evidence, and one kind is called indirect or circumstantial evidence. Direct evidence, for example, is evidence of a witness as to what he or she saw or heard as an eyewitness of the offense under inquiry.

Indirect evidence is supplied by testimony as to facts and circumstances which tend to show that the offense under inquiry has  
2307 been committed, and by whom it was committed. In other words, circumstantial evidence is composed of proved facts which raise a logical inference as to the existence of the fact that is in issue in the particular case, and which by experience have been found to be so associated with that fact that in the relation of cause and effect they lead to a satisfactory conclusion.

Both kinds of evidence, direct and circumstantial, have been introduced into this case. Both kinds of evidence are equally entitled to consideration by a jury. Sometimes a jury may consider that indirect evidence is stronger than direct evidence. But the rule is the same as to both, whether it be direct or circumstantial, that the evidence must satisfy the jury beyond a reasonable doubt as to the guilt of a defendant, in order for a conviction to follow.

In judging the evidence you must necessarily evaluate the testimony of individual witnesses. Only thus can you determine the truth, and it is the truth which you must seek. You should bring to this task your knowledge of human matters and human nature, your ability to judge men, their source of knowledge, their intelligence, their motives, their intentions, so that you may discern the real character behind the spoken words and measure their weight of truth and accuracy. In this connection you have a right to consider the manner of testifying, whether the witness on  
2308 the stand was evasive, whether there was a tendency to distort, or whether he or she was frank and candid in his or her testimony; also whether the witness was contradicted on material facts, whether the witness has any interest in the outcome of this proceeding or its results, friendship or animosity towards persons concerned herein. Many other human factors must be considered by you which may or may not affect the desire of a witness to tell the truth, depending largely on his or her innate character. Give the testimony only that weight to which in your judgment it is entitled when tested by all these considerations and in the light of all other evidence in this case.

You may consider the reasonableness or unreasonableness, the probability or improbability of the testimony of a witness, in determining whether to accept it as true and accurate, or the contrary. In that connection you may consider the opportunity or lack of opportunity for the witness to observe or hear any of the matters to which he or she testified.

If you believe that any witness has shown himself or herself to be biased or prejudiced either for or against either side in this trial, you may consider and determine whether such bias or prejudice has colored the testimony of such witness so as to affect the desire and capability of  
2309 that witness to tell the truth. You may consider the appearance, manner, demeanor and conduct of each witness who appeared on the stand, which is simply another way of saying what we all do in ordinary life. You may consider whether the witness looked and acted as if that witness were telling the truth fully, frankly, honestly and freely, what that witness knew to be so, or the contrary.

You may take into consideration all those factors shown by the evidence which reasonable people take into consideration when they come to determine the difference between truth and untruth, of truth and half truth. In other words, you may base your verdict upon that testimony which you believe to be true.

You are not to be controlled necessarily by the number of witnesses that have come before you testifying for either one side or the other. You are instructed that the testimony of one witness entitled to full credit is sufficient for the proof of any fact and may justify a verdict, even if a number of witnesses have testified to the contrary, if upon the whole case, considering the credibility of witnesses--which I have and will discuss with you--and after weighing the various factors of evidence, you believe they point to the accuracy and honesty of the one witness.

2310        In judging of the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his or her testimony, or by evidence pertaining to his or her motives.

          In this case two prior inconsistent statements of the witness Bernice Gross were received in evidence. You will recall that at the time they were received I gave you the very instruction I am giving you now:

          The law provides that where at a trial the testimony of a witness is inconsistent with the statement that witness previously made, and which statement substantially varies from his or her sworn testimony in court, the inconsistent statement is admitted into evidence solely for the purpose of bearing on the credibility of the witness. Thus you may only consider the statement in connection with your consideration of the credence you are to give to the witness' testimony in court. You may not consider the inconsistent statement given outside of the courtroom as one proving as a fact what is contained in that statement.

          It is the settled law in this country that accomplices in the commission of a crime are competent witnesses, and the government  
2311        has the right to use them as witnesses. In this regard I refer to the testimony of Bernice Gross. It is the duty of the Court to admit her testimony, and it is your duty to consider it. It should be received

with caution and scrutinized with care. The degree of credibility which you should give to such testimony is a matter exclusively within your jurisdiction.

You may, as a matter of law, convict a person accused of crime upon the uncorroborated testimony of an accomplice, but you should do so only after you have carefully and cautiously scrutinized such testimony. If you find that an accomplice is substantially corroborated by independent evidence with respect to material parts of his or her testimony, you should then give the entire testimony such weight as in your opinion it deserves.

Bernice Gross has admitted that in her two appearances before the grand jury on March 1, 1963, and in her one appearance before the grand jury on March 19, 1964, she answered some of the questions falsely. You are instructed that the testimony of an admitted perjurer should be considered with caution and weighed with care.

In connection with the testimony of Bernice Gross you may also consider, in judging her credibility, whether she is in fear of prosecution, or whether she expects leniency by the grand jury and the United States Attorney's Office, and, if so, whether or not that affects her credibility in any way.

There has been evidence in this case that the witness, Bernice Gross, was paid a total of \$378.88 by the United States Marshal's Office in the District of Columbia for appearances in this district. You

are instructed that this amount of money represents witness fees to which witnesses are entitled by law, and that witness fees are required by law to be paid to any witness who appears as a witness for the government.

In this case the defendant Forte took the witness stand and testified. With respect to him you are instructed that while the law makes a defendant a competent witness in this case, yet you have a right to take into consideration his situation and interest in the results of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as in your judgment it is fairly entitled to receive.

The fact that the defendant Forte has a criminal record has no bearing on the question of guilt or innocence of the charges on which he is being tried. The law, however, admits the criminal record of any person who takes the witness stand, solely for the purpose of assisting the jury in determining whether or not to believe the witness. Any fact that may tend to show that a witness may not be a truthtelling individual  
2313 is admissible in respect to such witness, whether the witness is a defendant or anyone else. Consequently you may consider the defendant Forte's criminal record, not as bearing on the question of his guilt or innocence, because his guilt must be established by evidence, irrespective of what his past may have been. You may consider his criminal record merely for the purpose and as a help in determining whether he was a trustworthy witness when he took the witness stand and whether his testimony should be believed.

If you should find that any witness knowingly testified falsely as to any material fact about which that witness could not have been mistaken, you are at liberty, if you deem it wise to do so, to disregard the entire testimony or any part of the testimony of such witness, except where corroborated by other credible testimony.

When you retire to the jury room to deliberate in this case, you will be given a copy of the indictment to take with you. That indictment reads as follows:

"Count One.

"1. That a grand jury was sworn in on July 5, 1961, in the United States District Court for the District of Columbia, and is known and hereinafter referred to as the July 1961 Grand Jury. That on September 11, 1961 Allan U. Forte was indicted by the July 1961 Grand Jury in Criminal Case No. 741-61, United States v. Allan U. Forte, and charged in four counts, each of which charged a violation of the abortion statute of the District of Columbia, Title 22, District of Columbia Code, Section 201.

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"2. That a petit jury was sworn in on February 12, 1963, in the United States District Court for the District of Columbia for the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, at which trial the defendant Allan U. Forte was represented by counsel James J. Laughlin.

"3. That the said Allan U. Forte and the said James J. Laughlin, the defendants indicted in this count, well knew the proceedings preliminary to and the trial of Counts One and Two of the aforesaid indictment would and did involve, among other things, a determination of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things:

2315

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and
- c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

"4. That commencing on or about September 1, 1961, and continuously thereafter until on or about February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte,

Criminal Case No. 741-61, within the District of Columbia, and the States of Maryland and Virginia and at other places unknown to this January 1963 Grand Jury, the said defendants Allan U. Forte and James J. Laughlin did unlawfully, wilfully, and knowingly conspire, combine, confederate, and agree together, and with each other, and with one Bernice Gross, a co-conspirator but not made a defendant herein, and with other co-conspirators unknown to this January 1963 Grand Jury, to defraud the United States and to commit other offenses against the United States, to wit, violations of Title 18, United States Code, Section 1503 (Influencing Witness), Section 1621 (Perjury), and Section 1622 (Subornation of Perjury).

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"5. That it was part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting, and having reason to know well, believe, and expect that the said Jean Smith would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly

endeavor to influence the said Jean Smith by counseling, advising, suggesting, and persuading her to induce the government to abandon prosecution and, if prosecution were not abandoned, then to absent herself from the said proceedings and trial, and, if she did not absent herself, then to testify falsely to the aforesaid matters at said proceedings and trial.

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"6. That it was also part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing and expecting, and having reason to know well, believe and expect that one Dorothy Lee Birge would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including sub-paragraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting and persuading her to testify falsely to the aforesaid matters at said proceedings and trial.

"7. That it was also part of the said conspiracy that the said defendants and co-conspirators would and did

corruptly endeavor to influence, obstruct and impede the due administration of justice in the said United States District Court for the District of Columbia in the proceedings preliminary to, and in the trial of, Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, in the manner and by the means above described.

"Overt Acts.

"At the time and places hereinafter mentioned, the said defendants and co-conspirators committed, among others, the following overt acts in furtherance of the said conspiracy and to effect the objects hereinbefore described and alleged:"

2318 THE COURT (continuing): Now, ladies and gentlemen of the jury, you are going to have this indictment with you in the jury room. There are some 71 overt acts charged. Counsel have agreed that I need not read them all to you. You will be able to read them. And, as you will hear me in a moment charge you, only one overt act needs to be proved.

So I will now, before going to Counts Two and Four of the indictment, explain to you what that Count One charging conspiracy means, and the law with respect to it.

The conspiracy statute, Title 18 United States Code, Section 371, reads as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be" punished by the penalty prescribed by the statute.

Conspiracy to commit a crime is an offense separate and distinct from the crime itself. In order to justify a conviction of a defendant on the charge of conspiracy, the following elements must be established beyond a reasonable doubt--which term I have already defined for you:

2319 First, that the conspiracy alleged was formed and existed

at or about the time alleged;

Second, that the defendant knowingly and wilfully became a member of the conspiracy;

Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and

Fourth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

A conspiracy is a combination by two or more persons to accomplish by concerted action a criminal purpose or a lawful purpose by unlawful means. In other words, a conspiracy is a partnership in crime in which each member of the conspiracy becomes the agent of every other member.

A conspiracy is created by an agreement to commit a crime. It is not necessary, however, to show that the persons charged with conspiracy met together and entered into a formal agreement. It is sufficient to show that they tacitly came to a mutual understanding to accomplish an unlawful design. Such an understanding need not be shown directly. Ordinarily a conspiracy is characterized by secrecy. The agreement may be inferred from circumstances, such as the conduct of the parties  
2320 and acts done by the accused persons. Such an agreement may be inferred from the fact that two or more persons are acting together in an endeavor to accomplish the unlawful result. In addition to any circumstantial evidence, you may consider any direct evidence that may have been received in this case concerning the existence of a conspiracy.

As I have said, a conspiracy may be established by circumstantial evidence or by deduction from facts. The common design is the essence of the crime, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result. If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One defendant may know but one other member of the conspiracy. But if, knowing that

others have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto.

Before a jury may find that a defendant or any other person  
2321 has become a member of a conspiracy, the evidence must show that the conspiracy was formed and that the defendant, or other person claimed to have been a member, knowingly and wilfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To participate knowingly and wilfully means to participate voluntarily and understandingly and with specific intent to do some act the law forbids, or with specific intent to fail to do some act the law requires to be done, that is to say, to participate with bad purpose either to disobey or to disregard the law. So if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and wilful participant--a conspirator.

One who knowingly and wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the instigators of the conspiracy.

In determining whether or not a defendant or any other person was a member of a conspiracy, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant

or any other person in a conspiracy must be established by evidence as to his own conduct, what he himself said or did.

2322        It is not necessary, in order to convict a defendant on a charge of conspiracy, that he shall have been a member of the conspiracy from the beginning. The joinder of a new party in a conspiracy, or the dropping out of a party to the conspiracy once it has been formed, does not constitute a new conspiracy or destroy the old one, nor does it remove the liability of the original conspiracy. Different persons may become members at different times; they may perform different parts in it; they need not be aware of all of the ramifications of the conspiracy. Each participant, however, must know the purpose of the conspiracy. If as alleged in this case a conspiracy existed, and if either defendant in this case knew of the conspiracy and purposely took some part, large or small, in carrying it into effect, he became part and parcel of it and may be found guilty of conspiracy. The fact that he may not have been in the conspiracy at its inception, or that he may have taken a minor part, or that he may not have known all of the conspirators, is immaterial, as is also the fact that he may have become a party to it at a later stage of its progress.

Now, one may become a member of a conspiracy without full knowledge of all the details. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way which furthers an object or purpose of the conspiracy, does not thereby become a conspirator.

2323        You are instructed that an attorney on behalf of a defendant has

the right, and it is his plain duty toward his client, to fully investigate the case in which he represents his client and to interview and examine as many as possible of the witnesses involved who could assist him in ascertaining the truth concerning the events in the controversy. Witnesses are not parties and should not be partisan. They may be summoned by one side or the other, or both.

The defendant James J. Laughlin, as attorney for the defendant Allan U. Forte in Criminal Case No. 741-61, was under a duty and obligation to properly investigate the facts and to interview any and all persons who might have knowledge or could shed any light on the allegations in the indictment. However, a lawyer representing a client in a pending case before the Court does not have a right to conspire with anyone else to influence a witness not to give testimony in a pending case or to influence a witness to testify falsely in a case.

With regard to the conspiracy count, a mere meeting between the defendants for innocent or legitimate purposes could not be construed as the beginning of a conspiratorial relationship. Nor does the mere innocent association or acquaintance of one defendant with another establish the essence of a conspiracy.

2324        However, if and when it should appear beyond a reasonable doubt from the evidence that a conspiracy existed and that a defendant was one of the members, then the acts thereafter knowingly done and the statements thereafter knowingly made by any person likewise found to be a

member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the particular defendant, provided such acts and statements were knowingly made and done by such other person during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy. Otherwise, any admission or incriminatory statement made outside of court by one person may not be considered as evidence against any other person who was not present and did not hear the statement made.

In your consideration of the evidence in this case as to the offense of conspiracy charged in the first count of the indictment, you should first determine whether or not the conspiracy existed as alleged in the indictment. If you find that the government has proved beyond a reasonable doubt that such conspiracy did exist, you should next determine whether the defendant Forte and the defendant Laughlin, or either of them, knowingly and wilfully became a member of the conspiracy.

2325        If it appears from the evidence beyond a reasonable doubt that the conspiracy was knowingly and wilfully formed as alleged in the indictment and that the defendants, or either of them, wilfully became a member of the conspiracy, at the inception of the plan or scheme or at some period after the inception of the plan or scheme, and that thereafter one or more of the conspirators during the existence of the conspiracy knowingly committed, in furtherance of the object or purpose of the conspiracy, one or

more of the overt acts charged in Count One of the indictment, then the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

By the term "overt act" is meant any act committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. In fact, it may be an innocent act. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and it must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment. It is sufficient to prove that a single overt act occurred in the District of Columbia, even though several overt acts are alleged in the indictment. In this connection you are instructed that a conversation 2326 on the telephone by either defendant Laughlin or defendant Forte while he was in the District of Columbia, with Bernice Gross in Baltimore, in furtherance of the conspiracy, would be an overt act committed in the District of Columbia, if you should find such telephone conversation to have been proved beyond a reasonable doubt.

If in this case you find beyond a reasonable doubt that the conspiracy existed and that one or both of the defendants became knowingly and wilfully a member or members of the conspiracy, at the inception of the plan or afterwards, and that one or more of the conspirators knowingly committed, in furtherance of an object or purpose of the conspiracy, one

or more of the overt acts charged in the District of Columbia, then either or both of the defendants who knowingly and wilfully became a member or members of the conspiracy, at the inception of the plan or scheme or afterwards, would be guilty under the first count of the indictment; and this would be true even though the conspiracy was unsuccessful in its purpose.

The indictment alleges that the witness Bernice Gross was an unindicted co-conspirator. Therefore, if you should find beyond a reasonable doubt that she was a co-conspirator, any act or acts of hers done in furtherance of the conspiracy, if you find that she did so act, are  
2327 to be considered by you as the act or acts of a conspirator, even though Bernice Gross is not named as a defendant. Her act or acts in furtherance of the conspiracy, if you find beyond a reasonable doubt that she did so act, are binding on the defendant Forte, or the defendant Laughlin, or both of them, provided you find that Bernice Gross was a member of the conspiracy and that both defendant Forte and defendant Laughlin, or either of them, wilfully became a member of the conspiracy at the inception of the plan or scheme or at some period after the inception of the plan or scheme.

The essence of the conspiracy in this case is the charge that there existed a conspiracy in connection with the case of the United States versus Allan U. Forte, Criminal No. 741-61, in this Court, to prevail upon one Jean Smith, a witness in that case, to endeavor to have the government abandon the prosecution of that case, or to absent herself from the trial of that case, or, if she did testify, to testify falsely.

If you find that Jean Smith was unsuccessful in endeavoring to have the government abandon the prosecution, or if you find that Jean Smith did not absent herself but did testify in Criminal No. 741-61, and did testify truthfully in that case, or, in other words, if you find that the object and purpose of the conspiracy failed entirely, the defendant, or  
2328 defendants, who knowingly and wilfully became a member of members of the conspiracy at the inception of the plan or scheme, or afterward, would still be guilty under Count One of the indictment, provided one or more of the overt acts charged is proved as I have previously instructed you.

Likewise, I instruct you that the question of whether or not Allan U. Forte was in fact guilty or not of the charges made against him in the first two counts of Criminal No. 741-61, or the fact that the defendant Forte was acquitted in Criminal 741-61, has no bearing on whether or not either of the defendants is guilty of the acts charged in this indictment.

Thus, if you should find from the evidence beyond a reasonable doubt that the conspiracy in fact existed and one or more of the overt acts charged under the conspiracy was committed in the District of Columbia, and that either or both of the defendants knowingly and wilfully became a member or members of the conspiracy at the inception of the plan or scheme, or afterwards, such defendant or defendants would be guilty of the conspiracy even though Allan U. Forte was in fact innocent of the charges

made against him in the first two counts of the indictment in Criminal No. 741-61, which charged violation of the abortion statute in the District 2329 of Columbia in connection with an alleged abortion performed on one Jean Smith, and even though defendant Forte was acquitted on the charges in the first two counts of the indictment in Criminal Case 741-61.

Likewise, if you find that Jean T. Smith did not wish to be a witness in Criminal Case 741-61, and that she willingly wrote and sent two letters and willingly sent the Dr. Goldberg letter to the United States Attorney's Office in the District of Columbia, this would be immaterial, provided you find that the government has proved beyond a reasonable doubt that the conspiracy existed and that the defendant Forte or the defendant Laughlin or the unindicted co-conspirator Bernice Gross, or all of them, acting as members of the conspiracy, and as a part of that conspiracy, encouraged, suggested, counseled, ordered or persuaded Jean Smith with respect to the writing or sending of any or all of the three letters.

If the jury should find that the conspiracy charge has not been proved beyond a reasonable doubt, or if the jury should find that none of the overt acts charged has been proved beyond a reasonable doubt, then neither of the defendants would be guilty under Count One of the indictment.

If the jury should find that both the conspiracy and an overt act have been proved beyond a reasonable doubt, but that the government 2330 has failed to prove beyond a reasonable doubt that either one or

both of the defendants did wilfully become a member of the conspiracy at the inception of the plan or scheme or at any time after its inception and before its completion, then the jury would bring in a verdict of not guilty as to Count One as to such defendant or defendants.

You are instructed that if the conspiracy charged in this case existed, said conspiracy necessarily terminated on February 20, 1963, when Criminal Case No. 741-61 terminated.

This Court admitted in evidence certain testimony of Bernice Gross concerning statements made to her by defendant Laughlin during two telephone calls between her and defendant Laughlin on February 27 and February 28, 1963. That testimony covered a period of time after the alleged conspiracy ended. Now I instruct you that that testimony is not admissible and may not be considered by you in any way against defendant Forte, either as to the charges asserted against him in Count One or Count Two of the indictment. You may, however, consider that testimony with respect to the degree of credibility you should give to other testimony of Bernice Gross which was admitted in evidence against the defendant Forte.

With respect to defendant Laughlin, I instruct you that the testimony of Bernice Gross concerning statements made to her by defendant Laughlin during the two telephone conversations between her and the defendant Laughlin on February 27 and February 28, 1963 may be considered by you not only in judging the degree of credibility you should

give to other testimony of Bernice Gross which was admitted in evidence against the defendant Laughlin, but also you may consider that testimony of Bernice Gross as bearing on the question of whether the defendant Laughlin was a part of any conspiracy that may have previously existed as alleged in the indictment, if you should find beyond a reasonable doubt from other evidence adduced in the case that such conspiracy in fact existed. However, I further instruct you that you may not consider the testimony of Bernice Gross concerning the February 27 and February 28, 1963 telephone conversations between her and defendant Laughlin with respect to whether or not the conspiracy did exist, or with respect to the charge asserted against defendant Laughlin in Count Four of the indictment, about which I will now instruct you.

Counts Two and Four of the indictment charge obstruction of justice. Count Two relates to the defendant Forte alone. Count Four relates to the defendant Laughlin alone. Count Two charges:

"1. The first two numbered paragraphs of Count One of this indictment" (which I have already read to you) "are  
2332 by reference incorporated into and made a part of this count.

"2. That the said Allan U. Forte, the defendant indicted in this count, well knew the proceedings preliminary to and the trial of Counts One and Two of United States versus Allan U. Forte, Criminal Case No. 741-61, would and did involve, among other things, a determination

of whether there had been a violation of the aforesaid abortion statute on or about July 20, 1961. More specifically, it was material to the aforesaid proceedings and trial to ascertain, among other things:

- a. Whether one Jean Smith, the abortion victim therein alleged, had been pregnant on or about July 20, 1961;
- b. Whether, within the District of Columbia, an abortion was attempted or procured or produced on the said Jean Smith, and by what means; and
- c. Whether the defendant Allan U. Forte was the individual who had attempted or procured or produced the abortion described in subparagraph b above.

2333

"3. That from about September 1, 1961 to February 20, 1963, the date of the return of the verdict in the trial of Counts One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, within the District of Columbia, the defendant Allan U. Forte, well knowing, believing and expecting, and having reason to know well, believe and expect that the said Jean Smith would be a material witness in the proceedings preliminary to and in the trial of Counts

One and Two of United States v. Allan U. Forte, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 2, including sub-paragraphs a, b and c thereof, the defendant, Allan U. Forte, did corruptly endeavor to influence the said Jean Smith by counseling, advising, suggesting and persuading her to induce the government to abandon prosecution and, if prosecution were not abandoned, then to absent herself from the said proceedings and trial, and, if she did not absent herself, then to testify falsely to the aforesaid matters at said proceedings and trial."

THE COURT (continuing): Count Four charges the defendant Laughlin alone in substantially the same language as I have just read to you from Count Two, except that in Count Four it is alleged that the acts occurred between April 15, 1962 and February 20, 1963; whereas against the defendant Forte, in Count Two, it is alleged that the acts occurred between  
2334 September 1, 1961 and February 20, 1963.

As I stated, you will have a copy of the indictment in the jury room with you. Counsel have agreed that the Court need not read Count Four to you.

Now in these two counts of the indictment which I have just referred to, Count Two charges the defendant Forte alone and Count Four charges the defendant Laughlin alone. Each is charged with violating

Section 1503 of Title 18 of the United States Code. This is one of the same sections which Count One charges that the defendants conspired to violate. But it is the violating of Section 1503 itself which is charged against the defendant Forte in Count Two and against the defendant Laughlin in Count Four.

Title 18, Section 1503 of the United States Code prohibits influencing a witness or obstructing the administration of justice, in the following language:

"Whoever corruptly . . . endeavors to influence, intimidate or impede any witness in any court of the United States . . . in the discharge of his duty . . . or corruptly . . . influences, obstructs or impedes, or endeavors to influence, obstruct or impede the due administration of justice, shall be"

punished by the penalty prescribed by the statute.

2335       The following are the elements of the crimes charged in these two counts which must be proved by the government as to each individual defendant, beyond a reasonable doubt:

1. That proceedings were pending in the United States District Court for the District of Columbia in Criminal Case No. 741-61, and that the defendant in each count, as it may be, knew or believed that such proceedings were pending.

A criminal proceeding is pending between the time a complaint is lodged with a committing magistrate charging a violation of the laws of the United States and the time a verdict is reached. In Criminal Case No. 741-61 a complaint was filed in August of 1961 and the case was terminated on February 20, 1963.

2. That Jean Smith was expected to testify as a witness in that case and that the defendant Forte and the defendant Laughlin, as each count applies to each of them, knew or believed that Jean Smith was to testify as a witness in the case.

3. That during the time the case was pending the defendant Forte and the defendant Laughlin, as each count applies to each of them, corruptly endeavored to influence Mrs. Smith.

2336

To corruptly endeavor to influence a witness means for an improper motive to make any effort to, to strive to, to try to influence a witness in a way which would impede or obstruct justice. To pay a witness in order that the witness would endeavor to have the government abandon prosecution, or in order that the witness would not testify, or in order that the witness would testify falsely, or to convey an intimation to a witness that the witness would be

paid for testifying falsely, would be to corruptly endeavor to influence that witness.

However, the endeavor need not be accompanied by payment or promise of payment of money in order to be corrupt. To make any effort to influence a witness for the purpose of obstructing the due administration of justice --and by "obstructing" is meant hindering, retarding or blocking--is to corruptly endeavor to influence that witness.

Nor is an endeavor necessarily an actual attempt.

Any effort to accomplish the evil purpose that Section 1503 was enacted to prevent would constitute an endeavor within the meaning of the statute.

In order to violate this section of the United States Code, it is not necessary to succeed in influencing a witness or to succeed in obstructing the due administration of justice. Corruptly endeavoring to do so, 2337 whether successful or not, is sufficient to violate the statute.

Therefore, in this case it would make no difference whether in fact Mrs. Smith was influenced by the alleged conduct of the defendants; nor would it make any difference if Mrs. Smith herself did not wish to testify. Even if Mrs. Smith was willing to send the letters in question, and even if she did not wish to testify, still an endeavor to influence her for an improper motive to send the letters in an effort to have the government abandon prosecution or an endeavor to influence her for an improper

motive not to testify, or to testify falsely, would be sufficient to violate the statute.

Likewise, it would make no difference under the statute whether the person accused in *United States v. Allan U. Forte*, Criminal Case No. 741-61, was found guilty or not guilty of the charges against him in those proceedings.

Now with respect to Counts Two and Four of the indictment, if the jury should find beyond a reasonable doubt that, as charged in Count One of the indictment, a conspiracy to corruptly endeavor to influence Mrs. Smith in fact existed, and that defendants Forte and Laughlin were members of the conspiracy, then any act within the scope of the conspiracy by any one of the conspirators in furtherance of the illegal purpose of the  
2338 conspiracy, during the time both defendants were members of the conspiracy, would be chargeable against the other conspirators as a violation of Title 18, United States Code, Section 1503, as alleged in Counts Two and Four.

For example, if the jury should find beyond a reasonable doubt that Bernice Gross and the defendants Forte and Laughlin were all members of the conspiracy to corruptly endeavor to influence Jean Smith and during the period of their membership of the conspiracy Bernice Gross did some act in furtherance of the conspiracy to violate Title 18, United States Code, Section 1503, then this act would be chargeable against both Forte and Laughlin as a violation of Title 18, Section 1503 of the United

States Code, as alleged in Count Two of the indictment against defendant Forte and as alleged in Count Four of the indictment against defendant Laughlin.

Likewise, if the jury should find, beyond a reasonable doubt, that Bernice Gross and the defendants Forte and Laughlin were all members of the conspiracy, an act by the defendant Laughlin in furtherance of the conspiracy would be chargeable to the defendant Forte in Count Two, and an act by Forte in furtherance of the conspiracy, under these circumstances, would be chargeable to the defendant Laughlin in Count Four.

2339        Now, of course, members of the jury, my comments, if any, on the evidence and on the facts are not binding on you; and if my recollection does not accord with your recollection of the testimony, then your recollection must prevail.

I want you to take this matter and consider it deliberately, in the light of the instructions which I have given to you, using the same ordinary common sense and ordinary intelligence which you would employ in determining any other important matter that you have occasion to decide in the course of your everyday life.

With respect to the possible verdicts in this case:

Under Count One, the conspiracy count, so far as the defendant Forte is concerned, the verdict will be either guilty or not guilty; so far as the defendant Laughlin is concerned, your verdict will be either guilty or not guilty.

Count Two, the substantive count against Forte alone, your verdict will be guilty or not guilty.

Count Four, the substantive count against the defendant Laughlin alone, your verdict will be guilty or not guilty.

As you know, your verdict must be by unanimous vote of all the jurors.

When you retire to the jury room you will select from among your number one to serve as your foreman.

2340        In the event there is any reason to communicate with the Court, your foreman will do so by a written message. There will be a marshal outside your door, and he will see that the Court gets it. But I caution you, at all times in any communication be very, very careful and don't disclose how you stand on any vote or how you are on any particular verdict. In other words, you may not let anyone know, except the 12 of you who are deliberating, how you feel at any time about guilt or innocence on any of these counts, until you come in and render a verdict.

THE COURT (continuing). Will counsel come to the bench, please.

(At the bench:)

THE COURT. Is there any object, Mr. Lowther?

MR. LOWTHER: No, sir.

MR. LAUGHLIN: Your Honor, I want to renew the requests for instructions that were denied.

THE COURT. I deny them again.

MR. GARBER. I join in that, Your Honor.

THE COURT: I deny yours again.

MR. GARBER. Your Honor, during the course of the instructions Your Honor was reading from the indictment and, as I recall, Your Honor read paragraph 6 on page 2.

THE COURT. Yes.

2341 MR. GARBER. That referred to Birge.

THE COURT. Yes.

MR. GARBER. And that material was stricken out.

THE COURT. It was not out of the copy I received, was it?

MR. GARBER. Well, actually this referred to Count 3, which was dismissed.

THE COURT. Do you want me to clarify it?

MR. GARBER. I feel at this point that to call the jury's attention further to it would compound the effect that the reading of this might have. Therefore, on the basis of the Court's reading paragraph 6 of Count 1 of this indictment, referring to Birge and not referring to Smith, I would move for a mistrial.

THE COURT. You don't want me to make any explanation?

MR. GARBER. Your Honor, I feel if you made an explanation, it would only compound what has already been done.

THE COURT. So therefore I understand you do not want me to make an explanation?

MR. GARBER. I would not ask for an explanation.

THE COURT. Mr. Laughlin, do you join in that?

MR. LAUGHLIN. I join in that point, and I agree with that.

2342 It would be prejudicial as far as both defendants are concerned.

THE COURT. Mr. Lowther?

MR. LOWTHER. There is no grounds for a mistrial here, sir.

THE COURT. I deny the motion for mistrial.

As I understand, both counsel do not want any explanation made of the paragraph 6, and I will not make any.

You don't want any explanation made either, of paragraph 6, Mr. Lowther?

MR. LOWTHER. No, sir.

THE COURT. Is there anything else?

MR. GARBER. Your Honor, when the Court instructed as to the criminal record of Dr. Forte, there has been testimony by Forte explaining the conviction.

THE COURT. Yes, sir.

MR. GARBER. And there was also testimony he had received a pardon.

THE COURT. Yes, sir.

MR. GARBER. I think the jury should be instructed that in connection with Forte's criminal record "you are further instructed that in evaluating Forte's criminal record as affecting Forte's credibility, you may also consider the explanation given by Forte on the witness stand attenuating such conviction, including the testimony that Dr. Forte has  
2343 received a pardon from the Governor"--

THE COURT. What are you reading from?

MR. GARBER. This is something I wrote out, Your Honor.

MR. LOWTHER. I will object.

THE COURT. I think that was a matter for argument. You didn't see fit to argue it. I am not going to instruct on it.

MR. GARBER. I would also ask the Court to instruct the jury on Forte's theory of defense.

THE COURT. What is his theory of defense?

MR. GARBER. Well, his theory of defense was this, as he testified.

THE COURT. I asked if you wanted entrapment, and you said you didn't.

MR. GARBER. No, that is not our theory, not entrapment, Your Honor. But that the jury be instructed, as Forte testified, his relation with Gross was instigated by Gross, and the purpose of their meeting and telephone conversations was for Gross to supply Forte with information concerning one Samuel Wallace.

THE COURT. In other words, you want me to argue your case for you this morning; is that right? You argued that yesterday.

2344 MR. GARBER. But I think the defendant is entitled to an instruction on his theory of the case.

THE COURT. I deny your request.

MR. GARBER. Your Honor, I have written these out in long-hand and I would ask that they be made a part of the record (handing).

THE COURT. We had better put a number on them. You want to just carry these on with the next number?

MR. GARBER. Yes, Your Honor. I think it would be 35.

THE COURT. Do you have any particular order for them?

MR. GARBER. I read the criminal record one first, which should probably be 35, and the other one 36.

THE COURT. I deny them both.

MR. GARBER. And may the record show that the defendant Forte objects to the denial of 35 and 36?

THE COURT. Yes, sir. Today is the 29th.

MR. GARBER. As well as the denial of all of the other instructions?

And the record will also show that the defendant Forte objects to the denial of his motion for mistrial.

MR. LAUGHLIN. Your Honor, let the record show I am joining in this, also.

2345 THE COURT. Surely.

I tell you what I am going to do. I can't find the copy of the indictment that I was having prepared to send in. It must be in my chambers. So I will tell the jury the indictment will be turned over to them by the Marshal. And I am also going to tell them they may call for any exhibits they desire that have been received in evidence.

MR. LAUGHLIN. Your Honor understands the request I made; it is a renewal of the motions made and denied during the trial, as well as denial of the instructions. I think you covered it yesterday.

THE COURT. I reiterate all the rulings I made yesterday.

MR. LAUGHLIN. Yes.

MR. GARBER. And I join in that motion, so that the record will be perfectly preserved.

THE COURT. Is there anything further?

MR. LAUGHLIN. I have nothing further.

MR. GARBER. Other than those objections

(In open court:)

THE COURT. Ladies and gentlemen of the jury, I will have made available to you, through the Marshal, a copy of the indictment, which will be furnished you; and you may at any time request any or in  
2346 fact all of the exhibits which have been received in evidence. Those received in evidence will be furnished to you at your request. The Marshal will be right outside the door and you can let him know; your foreman can communicate in that way with him.

Now, Mr. Singleton, Mrs. Owens and Mrs. Ormsby, do you have any personal effects in the jury room? You are the alternates. (There was an affirmative response.) Would you please step in and bring them out, and then come back in here, please.

(The alternate jurors having returned to the courtroom:)

THE COURT. Now the regular 12 jurors may accompany the Marshal to the jury room. The three alternates will stay here, please.

(Accordingly at 11:21 a.m. the jury retired to consider of its verdict.)

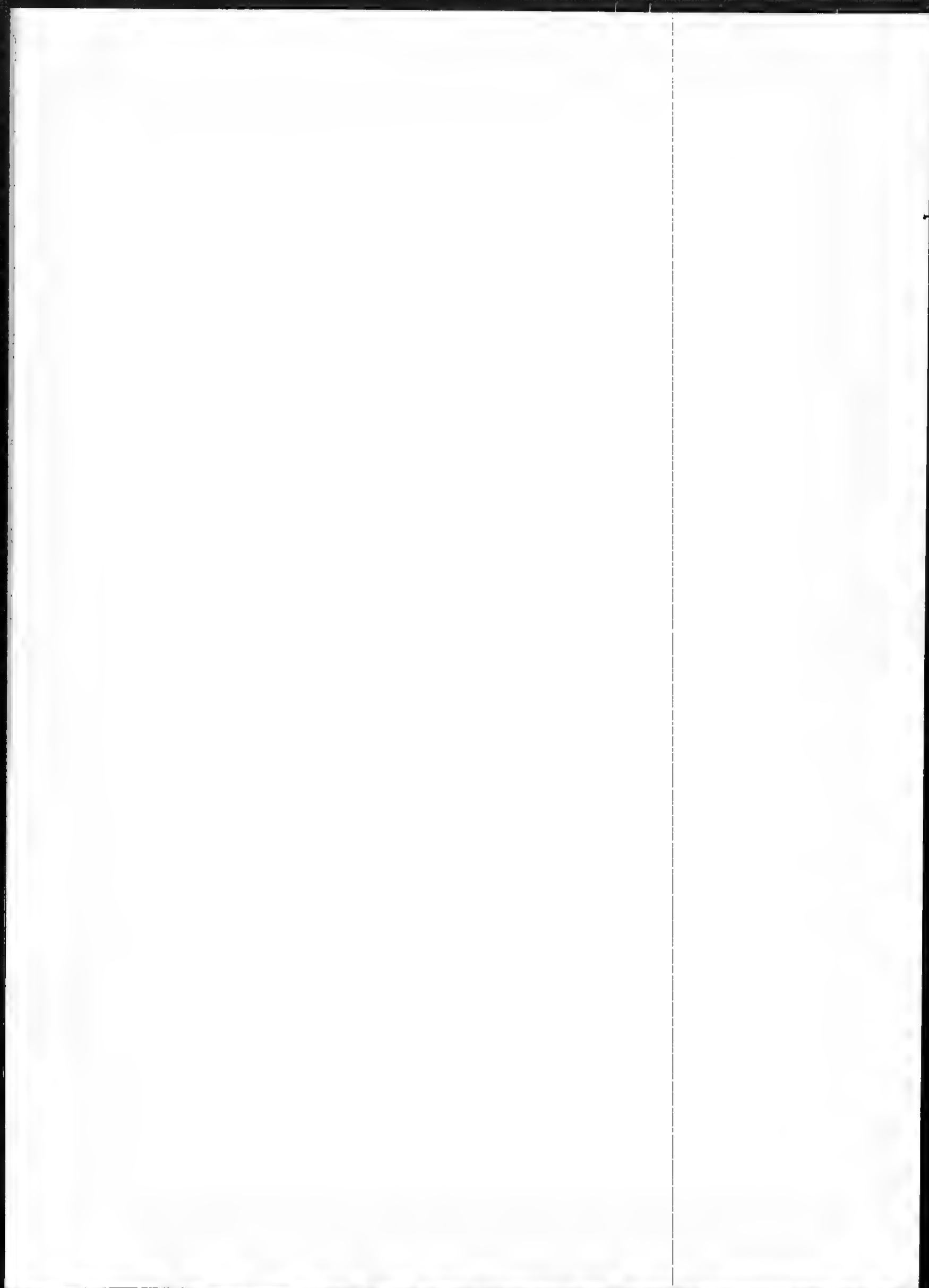
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#### REPORTER'S CERTIFICATE

This record is certified by the undersigned reporter of the United States District Court for the District of Columbia to be the official transcript of the proceedings indicated.

/s/ Thomas O'Neal

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BRIEF FOR APPELLEE

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 19562

JAMES J. LAUGHLIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

No. 19563

ALLAN U. FORTE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

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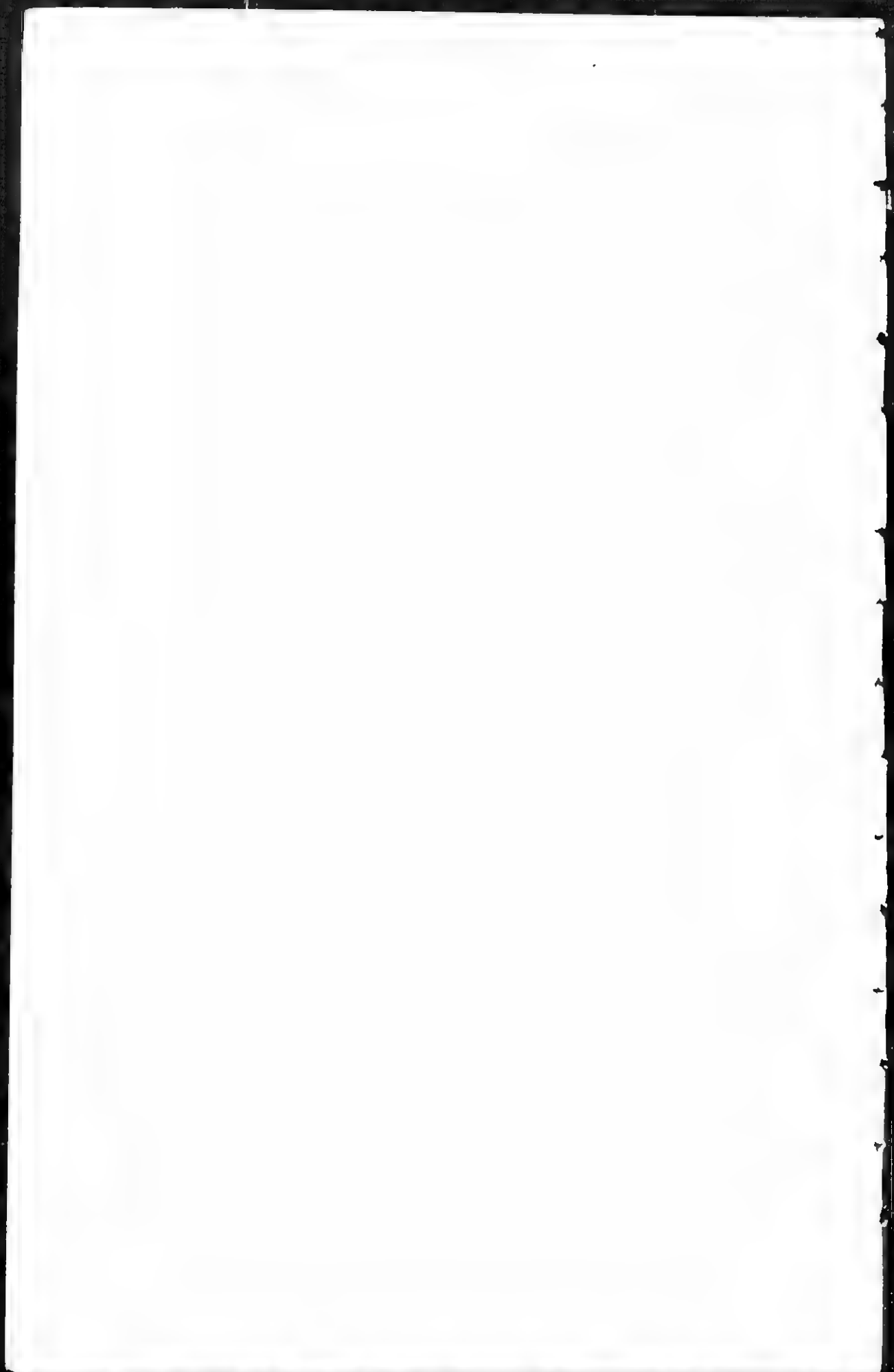
DAVID G. BRESS,  
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JAMES A. STRAZZELLA,  
*Assistant United States Attorneys.*

Crim. No. 600-63

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United  
FILED DE 1966  
*Chambers*



### QUESTIONS PRESENTED

In the opinion of appellee, far fewer questions than those set out in appellants' brief are raisable under any view on this record. However, as to each of the questions set out by appellants, appellee submits that those questions are more appropriately stated as follows:

1. Is it erroneous for a trial judge to read the entire conspiracy count of an indictment, including a non-essential allegation not supported by evidence, when appellants make no objection before the instruction, after adequate notice, and where no part of the count has been withdrawn? Assuming error, it is prejudicial in light of a charge that the indictment is not evidence, and when there is no rational possibility that the jury convicted on such a basis? In any event, have not appellants waived any right to claim prejudice by expressly refusing a cautionary instruction which would have been effective, even if unnecessary?

2. In an otherwise exemplary reasonable doubt instruction, is it reversible error not to expressly instruct that "a reasonable doubt may arise from lack of evidence"?

3. Does the doctrine of collateral estoppel apply where the prior ruling relied upon was one of law (not of fact) and was also a question not at all identical with the issue involved here?

4. In the absence of new facts or supervening law, does this Court's previous rejection of appellants' identical "grand jury bias" point constitute the law of the case?

5. Granting it has been held that four March 1963 tape recordings were illegally procured, does that fact have any relevance to appellants' convictions in this case where it is clear that (a) the tape recordings were not introduced, and (b) no mention was otherwise made of the conversations (which themselves are valid evidence but held only to be illegally recorded), and (c) no evidence is derived from those recordings?

6. Does an appellate allegation that sundry statutes have been violated have any legal significance in regard to appellants' trial where no evidence constituting a fruit of those al-

leged violations is shown to exist or to have been introduced at trial?

7. Is not a claim of alleged "coercion" of a witness a matter for the jury to consider in weighing the witness' credibility?

8. May appellants assert for the first time on appeal that the testimony of the key Government witness should have been stricken because of an alleged inability to use Jencks Act statements when the record vividly reveals that appellants were in possession of the statements in question and did use those statements for impeachment purposes?

9. Do appellants have standing to assert the rights of another?

10. Does appellants' argument of "lack of fundamental fairness" add anything to their other arguments?

11. Does not the evidence abundantly support the verdict on the conspiracy count?

12. Did the trial judge err in refusing appellant Forte's unrequired instruction concerning his testimony when that instruction was tendered only after appellant had by-passed the numerous opportunities to request instructions and only when the trial judge had concluded his instructions to the jury?

13. Did the trial judge abuse his discretion in refusing to treat as a missing Government witness a person who was no part of the Government's case and who was not in a position to elucidate appellants' guilt or innocence on the charges involved and whose name was injected into the case by appellants?

14. Did the trial judge abuse his discretion in allowing impeachment of Forte by a prior 1942 North Carolina conviction for abortion where the judge (a) held an exceptionally extensive *Luck* hearing, (b) considered the age of the conviction and the fact that it had been pardoned but apparently on grounds other than innocence, (c) prohibited use of a Maryland record showing guilt on five or so 1954-55 abortion charges, and (d) expressly exercised his discretion in view of *Luck*? Was there prejudicial error in the trial judge's refusal, after appellant Forte's untimely request, to add additional matter to the instruction on the effect of the prior conviction

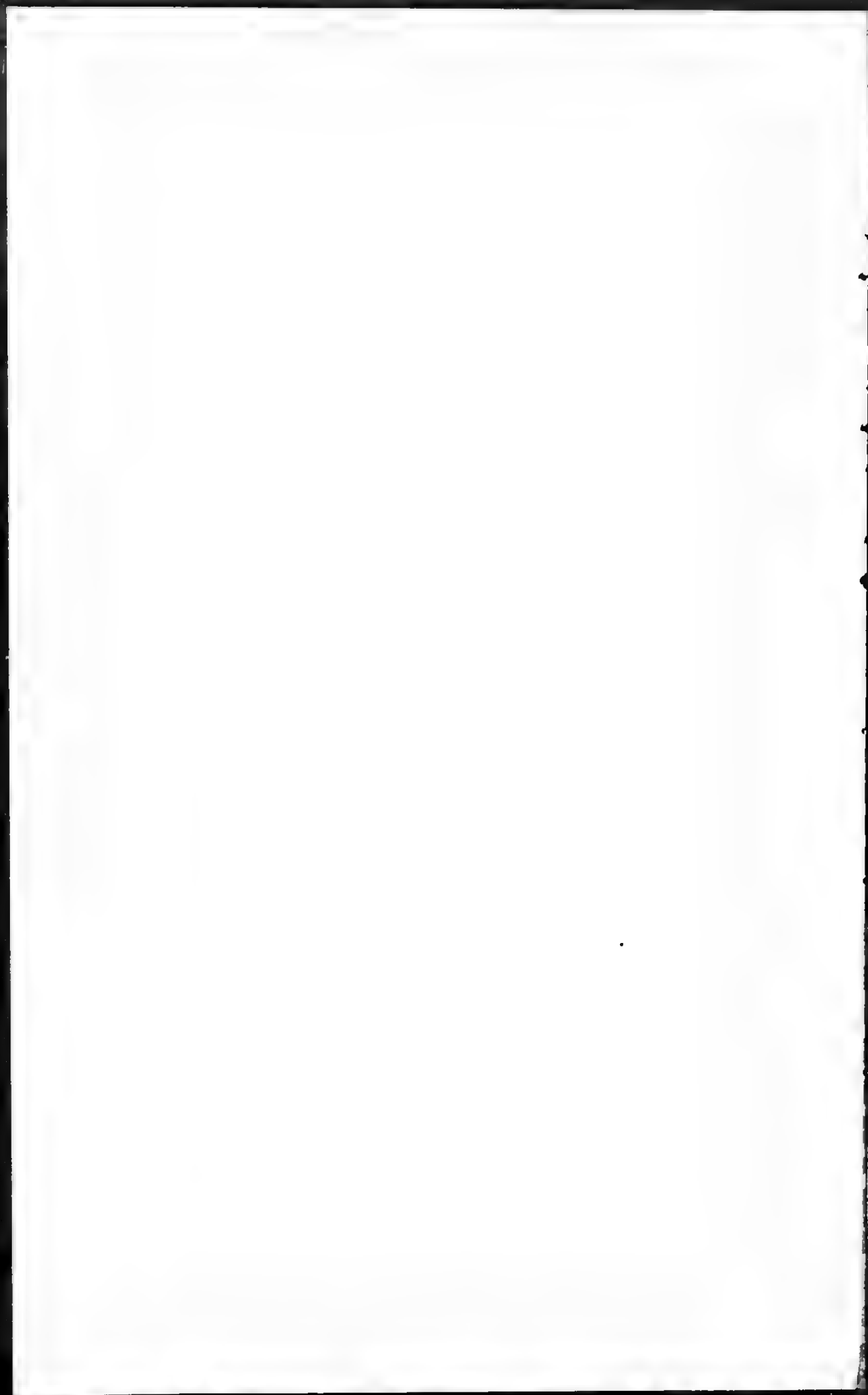
### III

when before the charge counsel had assured the trial judge that the instruction to be given was the proper one, and especially when the court told counsel he could argue the matter which was ultimately contained in the untimely request but counsel did not see fit to do so?

15. Did the trial judge abuse his broad discretion in sustaining an objection to a question on cross-examination which was not shown at trial (or even on appeal) to have any direct or indirect materiality to the trial of this case or the credibility of the witness?

16. Did the trial judge err in his instructions in failing to treat Mrs. Gross' courtroom testimony as hearsay?

17. Does appellants' vague complaint that they should have been given the entire grand jury minutes have any merit when the record shows that appellants were in possession of exceptionally extensive grand jury testimony covering the Government witnesses against them and much more, and when they did not move for further production but, instead, acknowledged at trial that the grand jury testimony had been very completely and minutely made available to them.



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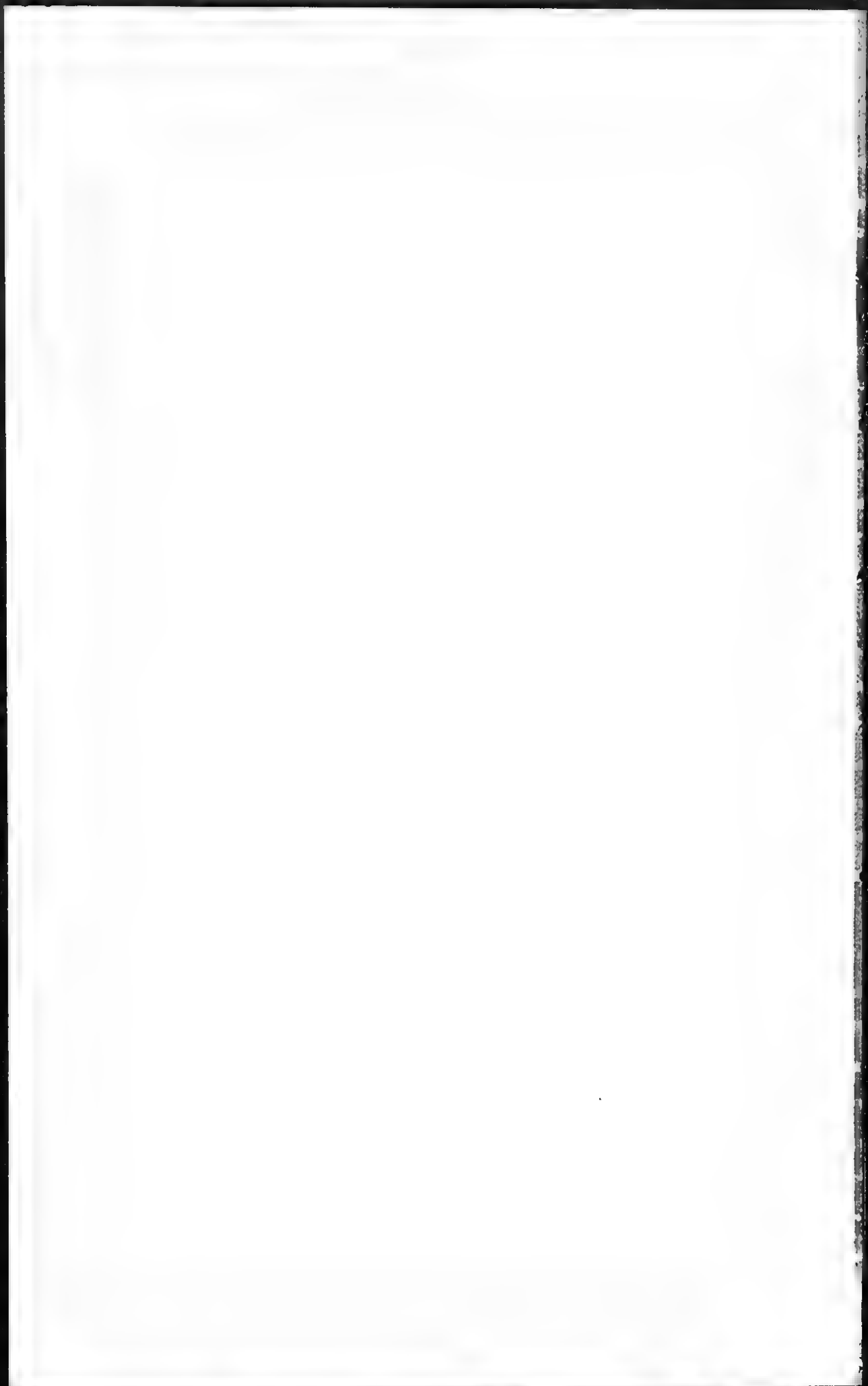
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# **United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 19562

JAMES J. LAUGHLIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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No. 19563

ALLAN U. FORTE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA*

**BRIEF FOR APPELLEE**

## **COUNTERSTATEMENT OF THE CASE**

On this appeal appellants Laughlin and Forte each contest their convictions (1) for conspiracy to commit certain offenses against the United States and to defraud the United States (18 U.S.C. § 371), and (2) for corruptly endeavoring to influence a witness (18 U.S.C. § 1503).<sup>1</sup> Each appellant has been sentenced to imprisonment for 20 months to 5 years and \$10,000 fine on the first offense, and to 20 months to 5 years in regard to the second crime, the sentences to be served concurrently. Some background is necessary.

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<sup>1</sup> Appellants were tried jointly and noted separate appeals. Their cases were consolidated by order of this Court dated August 8, 1965.

### Background

In Crim. No. 741-61, *United States v. Forte*, appellant Forte was charged in two counts with having procured and having attempted to procure an abortion on one Jean Smith, and in two additional counts with having procured and having attempted to procure an abortion on one Dorothy Birge. Appellant Laughlin entered his appearance as attorney for Forte in that case on April 20, 1962.<sup>2</sup> On February 12, 1963, trial in that case commenced on the two counts relating to the alleged abortion on Jean Smith, the two counts dealing with the alleged abortion on Dorothy Birge having been severed. Jean Smith testified in that trial, which ended in acquittal of Forte on February 20, 1963. Following termination of the trial in Crim. No. 741-61, an investigation was conducted by the January 1963 Grand Jury into all the evidence of any obstruction of justice in the case.<sup>3</sup> Several indictments resulted from that 1963 grand jury investigation, including the indictment in the instant case.

### Proceedings in This Case

The indictment filed on July 2, 1963 in the instant case was in four counts. *Count One* charged that both appellant Laughlin and appellant Forte had unlawfully and knowingly conspired with each other and with one Bernice Gross (a co-conspirator who was not named as a defendant) to defraud the United

<sup>2</sup> See Docket No. 741-61 ; Tr. 52, record in instant case.

<sup>3</sup> See the grand jury minutes filed as exhibits in the instant record on appeal (D.C. Cir. Nos. 19562, 19563) which cover a part of the investigation. The investigation grew out of the trial of Crim. No. 741-61 itself. While testifying in his own behalf, Forte had charged that the arresting officer in the case, Detective Samuel Wallace of the Washington police force, had offered to "fix" the matter and to protect his (Forte's) operations in the abortion trade (Transcript of trial proceedings in Crim. No. 741-61, pp. 326-27, 381-83). Wallace denied that charge. During a hearing on a motion filed by Laughlin in regard to this charge, Government counsel stated that any evidence of obstruction of justice should be presented to a grand jury and that "a Grand Jury should be immediately convened upon the conclusion of the trial and all evidence of any obstruction of justice should be presented." (Transcript of hearing on Motion For Lie Detector Test, p. 11, filed in Crim. No. 741-61).

See record on prior appeal, D.C. Cir. Nos. 18711, 18712, containing transcripts in Crim. No. 741-61.

States and to commit other offenses against the United States (18 U.S.C. § 371), to wit: influencing a witness (18 U.S.C. § 1503), perjury (18 U.S.C. § 1621), and subornation of perjury (18 U.S.C. § 1622). Count One further charged that the conspiracy related to proceedings preliminary to, and to the trial itself, of Crim. No. 741-61, wherein Forte was charged with violations of the abortion statute; that the conspiracy commenced on or about September 1, 1961, and continued until about February 20, 1963 (the date of the return of the verdict in Criminal No. 741-61); that it was part of the conspiracy that appellants Laughlin and Forte, well knowing that one Jean Smith would be a material witness in the abortion case, corruptly endeavored to influence Jean Smith to abandon prosecution, or if prosecution was not abandoned then to absent herself from the proceedings, or, if she did not absent herself, then to testify falsely; that it was part of the conspiracy to obstruct the administration of justice in the trial of Crim. No. 741-61 in the manner set out; and that the co-conspirators committed, among others, seventy-one enumerated overt acts in furtherance of the charged conspiracy. *Count Two* of the indictment charged appellant Forte with the substantive offense of corruptly endeavoring to influence the witness Jean Smith in the abortion trial in Crim. No. 741-61. *Count Three* charged appellant Forte with the same substantive offense as to one Dorothy Birge and was subsequently dismissed in December 1963 on motion of the United States. *Count Four* charged appellant Laughlin with the substantive offense of corruptly endeavoring to influence the witness Jean Smith.

A plethora of papers have been filed in this case, but it is pertinent to note that a motion to dismiss the indictment on the basis of alleged insufficiency of evidence was denied on November 13, 1963.<sup>4</sup> Another motion to dismiss the present indictment, this one alleging bias on the part of the grand jury, was filed on April 1, 1964, heard on April 14-15, and denied on April 15, 1964 (see Transcript of original trial of this case, p.

<sup>4</sup> *United States v. Laughlin*, 223 F. Supp. 623 (D.D.C. 1963). The motion stated that the indictments should be dismissed "for the reason that there was no competent and credible evidence before the Grand Jury on which to base the indictment."

314). A third motion to dismiss the indictment, based on alleged abuse of grand jury process, was filed on April 22, 1964 and was, after hearing, denied the same day.

Appellants Laughlin and Forte were tried jointly. During the original trial of the case, which began on April 16, 1964, there was introduced along with other evidence incriminating tape recordings of telephone conversations between Mrs. Gross and appellant Laughlin in March 1963. That original trial resulted in a jury verdict of guilty, the jury finding each defendant guilty of the conspiracy and of the substantive offense of endeavoring to influence Jean Smith. The judgments of conviction were subsequently appealed and resulted in reversal, this Court concluding that the Government had been collaterally estopped from introducing the incriminating tape recordings by a prior, unfavorable determination in another case which had determined that the tapes were inadmissible because Mrs. Gross had not validly consented to them.<sup>5</sup> *Laughlin & Forte v. United States*, 120 U.S. App. D.C. 93, 344 F. 2d 187 (1965). The case was remanded. *Ibid*.

There followed upon remand another motion to dismiss the indictment in the instant case (see Motion of May 7, 1965; not that contained in ~~appendix to appellants' brief~~<sup>Joint</sup>, p. 61-A). That motion was denied on May 24, 1965 (J.A. )<sup>\*</sup> and the case came on for the trial involved on this appeal. Appellants were jointly retried, this time before District Judge Jones and a jury. This second trial lasted 20 days, beginning on June 2, 1965.

<sup>5</sup> *United States v. Laughlin*, 222 F. Supp. 264 (D.D.C. 1963) (Youngdahl, J.) (dealing with the tape recordings in the context of a perjury charge in Crim. No. 599-63). The district court had declared a mistrial in Crim. No. 599-63, since the tapes had been introduced, and the indictment in Crim. No. 599-63 was subsequently dismissed on the ground that, without the tapes, the evidence before the grand jury was insufficient to sustain the perjury indictment. *United States v. Laughlin*, 228 F. Supp. 623 (D.D.C. 1963) (Curran, J.), *on motion to vacate prior order* 228 F. Supp. 112 (1964) (Curran, J.). This latter ruling was based on the premise that perjury charge could not stand on the uncorroborated testimony of one witness without convincing corroboration, and that there was no such convincing corroboration present. At the same time, Judge Curran denied the motion to dismiss the indictment in the instant case on the same grounds, this not being a perjury case.

<sup>\*</sup> "J.A." refers to the Joint Appendix. Although this order was designated by appellee, for some reason it is not contained in the Joint Appendix.

### The Government's Evidence at Trial

In general and by way of introduction, at the trial the Government introduced evidence to the effect that appellant Forte, charged in Crim. No. 741-61 with having attempted and procured an abortion of Jean Smith, desired that the case be dismissed or that the proof against him be insufficient. Accordingly, he caused certain amounts of money to be delivered to Jean Smith. The money was intended as a reward to Mrs. Smith for either not appearing at the trial of No. 741-61 or for testifying falsely in the event she did appear, and was transmitted from appellant Forte to Mrs. Smith by an intermediary, Bernice Gross. Appellant Laughlin, Forte's attorney, conspired to carry out his client's illegal purposes and he himself, through the agency of Bernice Gross, sought to corruptly influence the witness Smith. The Government's evidence was introduced, in part, through the testimony of Mrs. Smith (the key witness in the abortion case), and Dorothy Birge (also alleged to have been an intended intermediary of Forte), and Bernice Gross. Mrs. Gross' testimony as to phone calls she made was corroborated by the introduction of telephone company records which corroborated the fact that such calls were made but which showed nothing of the substance of the calls. The tape recordings of the March 1963 Gross-Laughlin calls, which were involved in the previous appeal, were not of course introduced. Nor was any testimony given concerning these calls or any records of those calls introduced. More particularly, the evidence against appellant showed, in part, the following.

#### *Testimony of Dorothy Birge*

Dorothy Birge testified only in support of the conspiracy charge against appellant Forte (Tr. 38-39; J.A. 127). It was her testimony that on September 1, 1961 she received a call in Alexandria from Forte, whom she had seen in person before the call and with whom she had conversed by phone previously (Tr. 33-34, 38; J.A. 121-22, 126). Forte identified himself by name and Mrs. Birge also recognized his voice (Tr. 36-37; J.A. 124-25). Forte asked Mrs. Birge if she would contact Jean Smith and tell Mrs. Smith that Forte would return her

money if Mrs. Smith would be unable to remember anything on the stand (Tr. 36; J.A. 124).

*Testimony of Jean Smith*

Jean Smith, the target of the conspiracy, also testified for the Government. She stated that she had been interviewed by Mrs. Gross in July 1961 (Tr. 46-47; J.A. 129). She affirmed that in the Spring of 1962 she received a phone call from Bernice Gross, who told her she was no longer with the police department (which had investigated the case) and talked about the abortion case against Forte (Tr. 50, 53-54; J.A. 132-36). Mrs. Gross suggested that if Mrs. Smith were called as a witness she could fail to identify Forte or answer that she didn't remember, or that Mrs. Smith could leave town. When Mrs. Smith expressed the impossibility of the latter idea, with a family at hand, Mrs. Gross noted that there were "ways". (Tr. 65-66; J.A. ———.) Mrs. Smith acknowledged writing a letter dated October 15, 1962.<sup>7</sup> Before writing the letter, which was to the effect that Mrs. Smith did not want to appear at trial, she had received a call from Mrs. Gross in September and had talked with her about the letter, which Mrs. Smith subsequently sent. Mrs. Smith brought up the subject of such a letter and Mrs. Gross said it was a good idea, telling her she had heard Forte had gotten a new lawyer and they would appreciate more time to prepare the case. (Tr. 67-69; J.A.

.) The day after the letter was received in the United States Attorney's Office, Mrs. Smith received a call from Mrs. Gross who said "they" were glad the letter had been sent and she had a little gift for her. The "little gift" which Mrs. Smith soon received was \$75, transferred by Mrs. Gross at a Hecht Co. store, and used to buy maternity clothes. (Tr. 69-70; J.A. .)

Mrs. Gross and Mrs. Smith had numerous conversations. The first letter had not excused Mrs. Smith from the case and Mrs. Gross suggested to her that a letter from a doctor might help. Mrs. Smith received another \$100 from Mrs. Gross. A week later she mailed a second letter to the United States Department of Justice, this one dated November 13, 1962 and

<sup>7</sup> Gov't Exhibit 2.

consisting of a statement by Dr. Goldberg concerning Mrs. Smith's pregnancy (Gov't Exhibit 3). Soon after this letter was received, Mrs. Gross called Mrs. Smith about the letter having been received at the United States Attorney's Office. Mrs. Gross informed her that everyone was very pleased, that the upshot would be to extend the trial to a later date and that it might even be dropped; Mrs. Smith was also notified that there was another gift awaiting her. She subsequently received \$200. (Tr. 76-77; J.A. .)

There were a number of conversations concerning why Mrs. Smith was receiving the money. Mrs. Gross stressed to her that if the case was dragged out long enough it might eventually be dropped and that the money might make it a little easier for Mrs. Smith not to be able to remember or identify. (Tr. 77-78; J.A. .)

Mrs. Smith additionally identified a joint letter of January 20, 1963, signed by her and her husband, and stating that the hurt and shock had died down causing them to want to lay aside the abortion matter and that they had no desire to rekindle their humiliation. (Gov't Exhibit 4.) She testified that before writing the letter she talked with Mrs. Gross several times about writing it. Mrs. Gross suggested the letter, saying "the lawyer" had said it was a good idea. When later told that Mrs. Smith was having trouble expressing herself, Mrs. Gross told her she would try to find out how to write it. Mrs. Gross then got back in touch with Mrs. Smith concerning the manner in which the letter could be written. At trial she identified certain phrases given her over the phone by Mrs. Gross. (Tr. 80-84; J.A. .) When next Mrs. Smith was told that this letter had been received at the United States Attorney's Office, she was also told that "they" were sure this letter would end the case. Again, Mrs. Smith received money for her efforts. (Tr. 85-86; J.A. .) Mrs. Smith further testified that after the birth of her baby she received a layette set after having heard from Mrs. Gross that "they" wanted to give her a layette as a gift (Tr. 86-87; J.A. .).

Nearly every conversation with Mrs. Gross had embodied the suggestion about failing to identify Forte or not remembering (Tr. 87-88; J.A. ).

*Testimony of Bernice Gross*

Bernice Gross was the Government's key witness. She testified that she had at one time been a policewoman on the Abortion Squad of the Baltimore Police Department, from February 1956 to February 1962, and that during the course of her duties she had occasion to interview Jean Smith in a Baltimore hospital in July 1961 (Tr. 238-39; J.A. 161-62). In February 1962 Mrs. Gross was dismissed from the police department.<sup>8</sup> About May 1962 she received a call at her home from appellant Forte (Tr. 239-40; J.A. 162-63). Forte mentioned Mrs. Gross' dismissal from the police department, then asked if she could help him out as far as the abortion case was concerned. He said he was an old and sick man and stood a chance of being deported. Mrs. Gross said she would call Mrs. Smith and see what she could do; Forte stated that both Mrs. Smith and Mrs. Gross would be compensated, Forte suggesting that when the abortion case came up for trial perhaps Mrs. Smith could fail to identify him. (Tr. 231; J.A. 164; Tr. 674.) Mrs. Gross called Jean Smith, but Mrs. Smith stated she could not lie. When Forte thereafter again called Mrs. Gross she reported Mrs. Smith's reaction. (Tr. 242-43; J.A. 164-65.)

Mrs. Gross once again heard from Forte when he told her that his attorney was not doing him any good and he was getting another attorney.<sup>9</sup> Forte notified Mrs. Gross that he was getting appellant Laughlin as his attorney and that Laughlin would get in touch with her. (Tr. 243-44; J.A. 166-67.) Mrs. Gross heard from appellant Laughlin in October 1962 by way of a phone call to a Hecht Co. store in Baltimore, where she was then working as a store detective (Tr. 239; 245; J.A. 162, 167-68). Laughlin introduced himself and told Mrs. Gross he would be in the store that evening. He in fact appeared there; Mrs. Gross was paged, and Laughlin asked if there was a place where the two could talk. The pair went to a lounge and after

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<sup>8</sup> Mrs. Gross was relieved of her duties with the Baltimore police department in February 1962 for not complying with police regulations while guarding a witness (see Tr. 238, 396, 423, 974).

<sup>9</sup> Mrs. Gross could not recall the exact time of this call but believed it might have been in September 1962.

some other conversation discussed Jean Smith. Laughlin wanted to know whether Mrs. Smith was the type of girl who would blackmail Forte, keep bothering him for money (Tr. 1126-27). When Mrs. Gross told Laughlin that Mrs. Smith had told her she couldn't lie, Laughlin replied, in substance, "that's ridiculous". Laughlin gave Mrs. Gross his business card, wrote his home phone number on the back, and told her he'd keep in touch. (Tr. 244-48, 286-87; J.A. 167-71, 206-08.)

Mrs. Gross was subsequently requested to have Jean Smith write a certain type of letter (Tr. 249; J.A. 172). She later heard from Forte or Laughlin that the letter (Gov't Exhibit 2) had been received at the United States Attorney's Office; she was also told that it was now hoped that the abortion case would be dismissed (Tr. 249-51; J.A. 172-73). After this conversation, Forte gave Mrs. Gross \$100 to give to Jean Smith; \$75 of the money was delivered to Mrs. Smith that night at the Hecht Co., Mrs. Gross retaining \$25 herself (Tr. 250-52; J.A. 173-76). Mrs. Gross relayed to Forte the fact that Mrs. Smith was in the seventh month of pregnancy and as yet had no doctor; Forte gave Mrs. Gross another \$100 to give to Mrs. Smith, and the money was delivered to her (Tr. 254-56; J.A. 177-79). Mrs. Gross again talked with both appellants, Laughlin suggesting that a letter showing pregnancy might help in the abortion case. After the letter (Gov't Exhibit 3) was sent, Mrs. Gross heard from appellant Laughlin that it had been received in the United States Attorney's Office in Washington (Tr. 258-60, 286; J.A. 179-82, 207). Again, Forte gave Bernice Gross money, this time \$200, to pass on to Mrs. Smith (Tr. 260-62; J.A. 181-83).

In December 1962, Forte and Mrs. Gross talked about a "Christmas present" for Mrs. Gross and she received \$100 from him (Tr. 262-67; J.A. 184-88). After the birth of Mrs. Smith's baby in January 1963, Mrs. Gross sent her a complete layette set at Forte's behest (Tr. 267-70; J.A. 189-92).

Prior to January 20, 1963, Mrs. Gross was told by appellant Laughlin in a phone call that he believed a joint letter from Mrs. Smith and her husband would have a better effect on the forthcoming abortion case. There were 3 or 4 phone conversa-

tions between Bernice Gross and Laughlin in regard to this letter. Laughlin told Mrs. Gross to call Jean Smith to tell her to write the letter and Mrs. Gross did so. When Mrs. Smith finally told Mrs. Gross that she was unable to word the letter, Mrs. Gross relayed that information to appellant Laughlin who articulated certain useable phrases.<sup>10</sup> Mrs. Gross phoned Mrs. Smith back and passed on the wording, which turned up in the letter (Gov't Exhibit 4). Appellant Laughlin subsequently told Mrs. Gross the letter had been received. (Tr. 271-75; J.A. 192-96.) When Mrs. Gross told Laughlin on the phone that she believed Mrs. Smith should get some money for writing the letter, appellant Laughlin said he would get in touch with Forte. Forte got in touch with Mrs. Gross and she was given \$200 for Mrs. Smith, which she delivered (Tr. 276-77; J.A. 196-98).

In February 1963 Laughlin called Mrs. Gross to advise her of the progress of the abortion trial. Appellant Forte also called during the trial, saying that Mrs. Smith had "told everything" and double-crossed him and that things were going very badly. He advised Mrs. Gross not to answer her phone or door (Tr. 323-25; J.A. 244-45).

Bernice Gross testified in detail as to phone conversations between her and Laughlin and between her and Forte.<sup>11</sup> Some

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<sup>10</sup> Mrs. Gross particularly remembered that Laughlin suggested "rekindle", "humiliation", and "embarrassment" because she was unable to write them in the shorthand notes she was jotting down (Tr. 273; J.A. 195).

<sup>11</sup> Mrs. Gross' testimony tended to establish the following calls, among others:

- October 11, 1962----- Dialed, station to station call from Laughlin's number to Gross' place of employment (Tr. 287-89; J.A. 208-09);
- October 16, 1962----- person to person call from Laughlin's number to Gross' place of employment (Tr. 290-91; J.A. 210-11);
- October 18, 1962----- direct station to station call from Laughlin's number to Gross' place of employment (Tr. 291-92; J.A. 212);
- October 22, 1962----- direct station to station call from Laughlin's number to Gross' place of employment (Tr. 293-94; J.A. 214);

of the calls were "collect" and were accepted by appellants (Tr. 278-325; J.A. 199-45). Some of the calls, those to Forte, were made under the assumed name "Mrs. Bee", which Forte had suggested she use (Tr. 305-06; J.A. 225-26). The calls always related to the abortion case (Crim. No. 741-61) and the dealings with Mrs. Smith (*e.g.*, Tr. 295, 297, 299, 302, 303, 306, 308, 313, 315, 317, 319, 324).

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- October 22, 1962---- operator call from Laughlin's number to Gross' place of employment (Tr. 295-96; J.A.     );
  - October 26, 1962---- dialed direct from Laughlin's number to Gross' place of employment (Tr. 295-96; J.A.     );
  - October 29, 1962---- collect, person to person call from Gross to Laughlin (Tr. 297-98; J.A. 219);
  - November 8, 1962---- collect person to person call from Gross to Laughlin (Tr. 300-01; J.A. 221);
  - November 9, 1962---- person to person call from Gross to Forte's number (Tr. 301; J.A. 221-22);
  - November 13, 1962-- direct, dialed call from Laughlin's number to Gross' place of employment (Tr. 301; J.A. 221-22);
  - November 27, 1962-- collect, person to person call from Gross' home to Laughlin's number (Tr. 302-03; J.A. 223);
  - December 1, 1962--- collect, person to person call from Gross to Forte (Tr. 264-65; J.A. 186-87);
  - December 3, 1962--- collect, person to person call from Gross to Forte (Tr. 263-64; J.A. 187);
  - December 18, 1962-- collect call from Gross to Forte (Tr. 305-06, 306; J.A. 226);
  - January 7, 1963---- call from Gross to Forte's Washington number (Tr. 306-07; J.A. 227);
  - January 18, 1963--- person to person call from Laughlin's number to Gross (Tr. 312-13; J.A. 233);
  - January 20, 1963--- call between Gross (in Baltimore) and Laughlin in Washington at EMerson 2-1776 (Tr. 278-79; J.A. 199-200);
  - February 7, 1963--- person to person call from Laughlin's number to Gross's home number (Tr. 316; J.A. 237);
  - February 12, 1963-- direct dial call from Forte's number in Washington to Gross' home number (Tr. 318-19; J.A. 239);
  - February 12, 1963-- call from Laughlin's number to Gross' home number (Tr. 319; J.A. 239);
  - February 13, 1963-- dial call from Laughlin's number to Gross' home number (Tr. 323-24; J.A. 244).

Mrs. Gross also testified to later calls, which came in under limited circumstances (Tr. 1116, 1118-19; Joint Appendix 105-06; Tr. 1672-73), after appellant Laughlin had attempted to impeach her by showing that she had lied to the grand jury. Mrs. Gross testified on rebuttal as to why she

Mrs. Gross' credibility was attacked by her own admission that she had perjured herself, in connection with the matters on trial, during two appearances before the grand jury on March 1, 1963 (Tr. 959-65); on the other hand, her testimony was corroborated by telephone records, kept in the normal course of business. The records of the calls to which she testified—showing source of call, date and time, number called, whether direct or person-to-person or collect, and (where applicable) the name of the party calling and the name of the person called—were introduced into evidence.<sup>12</sup> They corroborated Mrs. Gross' testimony, revealing calls from Baltimore to Washington, and vice versa, and from and to Laughlin and Forte, as well as the phone numbers, dates and times involved. Phone bills were also introduced.<sup>13</sup>

Additionally, Mrs. Gross' testimony was corroborated by the introduction into evidence of the Hecht Co. sales slip for the layette set sent to Jean Smith<sup>14</sup> and by the letters said to have been sent by Jean Smith, by Mrs. Smith and her husband jointly, and by Mrs. Smith's doctor.<sup>15</sup>

lied: appellant Laughlin had counseled her to do so (Tr. 1115-16). During the case in chief, in view of appellants' objection, the prosecutor forwent any examination in regard to these calls (Tr. 361-73), but appellant Laughlin subsequently opened the door by his questions (*e.g.*, Tr. 959-65, see Tr. 1112). The testimony concerning these calls tended to show:

February 27, 1963-- person to person call from Gross' home number to Laughlin's office number (Tr. 1115);

February 28, 1963-- direct dial call from Laughlin's office number to Gross' home number (Tr. 1115).

<sup>12</sup> The telephone company paper records indicating these calls did not, of course, indicate any substance of the calls. The records were introduced into evidence (Tr. 1652-75) after they had been explained by a representative of the telephone company (Tr. 1240-42, 1374-75, 1390, —, 1557-99, 1611-33).

At the times pertinent to the conspiracy, the parties involved had the following phone numbers: Bernice Gross—(home) FOrrest 7-7440, (work) IDlewild 3-8000; appellant Laughlin—(home) EMerson 2-1776, (office) NAtional 8-2001, (office) NAtional 8-1690; appellant Forte—(home) MOhawk 4-1530, (office) TAYlor 9-3377 (Tr. 240-41, 245; Tr. 1203-06, 1220-21.)

<sup>13</sup> Government Exhibits 7, 9, 23, 27, 29 (Tr. 1662-66). See also Tr. 266-67; J.A. 187-88.

<sup>14</sup> Gov't Exhibit 8; Tr. 1655. See also Tr. 269-70; J.A. 191.

<sup>15</sup> Gov't Exhibits 2, 4, 3; Tr. 1653-54. See also Tr. 258; J.A. 179-80.

*Other Government Evidence*

The Government also introduced the testimony of various other persons in order to identify and qualify the numerous exhibits and records placed in evidence.

**Defenses***Appellant Laughlin's Evidence*

Appellant Laughlin did not testify and his sole evidence consisted of an attempt to further impeach Mrs. Gross' credibility. He called as his witness Jean Smith (Tr. 1744-46). His examination of her was confined to eliciting that, in contradiction to Mrs. Gross' denial of such statements during the course of her dealings with Jean Smith, Mrs. Gross had implied to Mrs. Smith that everyone associated with the abortion case was "being paid off" (Tr. 1752) and that Mrs. Gross had also told her (Mrs. Smith) that Detective Wallace had been paid off on more than one occasion (Tr. 1754). Appellant Laughlin also offered into evidence the records reflecting the statutory witness and mileage fee payments to Mrs. Gross (Tr. 1758-59). Appellant Laughlin did not call or attempt to call co-defendant Forte as his witness.

*Appellant Forte's Evidence*

The sole evidence on Forte's behalf was his own testimony. Forte, a former chiropractor and physiotherapist, denied Mrs. Birge's testimony (Tr. 1824, 1856). He also denied that he had called Mrs. Gross in 1962 and approached her in regard to his abortion case (Tr. 1804-05). He denied that he ever instructed Mrs. Smith to lie or try to take steps to have the case against him dismissed (Tr. 1820) and he denied ever giving Mrs. Gross money to give to Jean Smith (Tr. 1815-16). Forte further stated that he had used appellant Laughlin's phone on several occasions (Tr. 1816-18). At first Forte recalled that some of these calls had been made to Mrs. Gross (Tr. 1817) but on cross-examination he declared that none of these calls had been to Bernice Gross and at no time did he speak to her on appellant Laughlin's phone (Tr. 1841-43). Forte also disclaimed making any long distance calls on Laughlin's phone from October 1962 to February 20, 1963. In many respects Forte's testimony

was vague and elusive, and he retracted various statements when cross-examined (see, *e.g.*, Tr. 1829-33, 1837-38).

Forte additionally charged that Mrs. Gross had called him and then approached him with an offer that she would "take care of" Wallace, whom Forte accused of haranguing him. He claimed he turned over money to Mrs. Gross for this purpose. (Tr. 1806-15.)

### Rebuttal

Mrs. Gross was called in rebuttal of appellant Forte's testimony. She denied Forte's allegations that it was she who had first approached him and she denied in detail Forte's additional allegations (Tr. 2129-42; J.A. . . . ).

She further stated that although she felt she could still be prosecuted and although she was cooperating with the Government, she would not lie for that reason (Tr. 2149).

### Verdict and Post-Trial Proceedings

On this evidence the jury returned its verdict that each defendant was guilty of the conspiracy and each was guilty of the substantive offense of endeavoring to influence Jean Smith.

An abundance of post-trial motions were filed, both in the District Court and in this Court, but there appears no necessity for reciting the substance of each. Among them was a motion for new trial (or alternatively for judgment n.o.v. or arrest of judgment), which was heard and denied July 16, 1965. Notices of appeal were filed July 26, 1965 following judgment. A motion in this Court for summary reversal was also filed and, after opposition, was denied on September 13, 1965.

Other facts pertinent to the seventeen sundry contentions raised by appellants are set out in the related arguments below.

### SUMMARY OF ARGUMENT

#### I.

The trial judge did not read a withdrawn count of the indictment in his charge; he did read the entire conspiracy count (no part of which had been withdrawn), one allegation as to which no proof had been offered. However, the reading of such an

unproven allegation in an indictment does not constitute error. In any event, there is no prejudice and, moreover, appellants should be precluded from now raising the issue after expressly refusing the trial judge's offer to give what would have been an effective cautionary instruction.

1

This Court has already rejected appellants' contention that the trial judge must add to his reasonable doubt charge an express statement that a reasonable doubt may arise from a "lack of evidence". Both authority and reason support that view.

2

Appellants' argument that the Government was collaterally estopped from introducing the telephone company records because of prior ruling in a different case misconstrues the previous ruling. Collateral estoppel applies only where the defendants can show clearly that the prior decision constituted a finding on the *same fact* now in litigation. In this case it is clear that the prior ruling did not go, or purport to go, to the same issue involved here. Furthermore, the prior ruling was one of law, not the finding of fact with which the collateral estoppel rule deals.

3

Appellants' allegation that "grand jury bias" requires a dismissal of the indictment is not only unfounded in fact, but it has already been rejected by this Court. Appellants rely on the same motion denied in the first trial and involved in the last appeal. In ruling as it did on that appeal, this Court rejected the argument now resurrected. The point need not be considered again.

4

Appellants' "fruit of the poisonous tree" argument is wholly without merit if for no other reason than that there was nothing introduced into this trial which was derived from the March 1963 tape recordings previously held inadmissible. (In fact, everything on the tapes was simultaneously and validly available to the Government.) But the fact is, not one piece of

5. & 6.

evidence at this trial was connected with the March 1963 tape recordings. Nowhere in the trial did appellants establish otherwise.

Similarly, whether appellants' allegations asserting that a Government official violated certain statutes by impermissible disclosures of privileged matters could be proven or not, the point is hypothetical at best. No evidence at appellants' trial was the product of these alleged violations.

7., 9. & 10.

Appellants' argument asserting the coercion of Mrs. Gross is based on no finding by any court. In any event, such allegations go to the weight of her testimony; the trial judge allowed wide range to appellants to bring out all relevant factors operating on Mrs. Gross' testimony and he told the jury of their significance in weighing Mrs. Gross' testimony. Appellants' "public policy" argument is merely an attempt to assert rights of Mrs. Gross allegedly violated; they have no standing to do so. Their "lack of fundamental fairness" argument does not relate to the fairness of their trial and adds nothing to arguments set forth elsewhere.

1.

Appellants' argument implying they were denied tape recordings qualifying as Jencks Act material and the right to use it is based on a mistaken recollection of the trial. They were put in full possession of the statements in question and freely used them for impeachment purposes.

11. & 16.

The record abundantly supports appellant's guilt of conspiracy. The foundations of appellants' argument on lack of evidence and the "denial of cautionary instructions" are premised on the common but foundationless view that Mrs. Gross' live, courtroom testimony was merely the "post-conspiracy declaration" of a co-conspirator and thus inadmissible without evidence of conspiracy aside from Mrs. Gross' testimony. The post-conspiracy declarations rule is a rule governing extra-judicial testimony and is based on hearsay considerations; it does not apply to the judicial non-hearsay testimony of Mrs. Gross.

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12.

The trial judge did not abuse his discretion in denying Forte's instruction summarizing his testimony. Counsel for Forte bypassed numerous appropriate opportunities to request such an instruction, if he thought it important. His request, when it finally came, was exceptionally ill-timed. Moreover, the instruction orally requested was not required and the ensuing handwritten request was not only unrequired but was improper in several respects.

13.

The trial judge did not abuse his recognized discretion in refusing to treat Detective Wallace as a missing Government witness. Aside from all else, he was not "essential" as appellants claim; rather, he was unnecessary and immaterial to the Government's case and could not elucidate the question of appellants' guilt of the charges on trial.

14.

The trial judge acted well within the discretion peculiarly vested in him in determining whether to allow Forte's impeachment by a prior 1942 North Carolina conviction. He considered the pardon (and the fact that it did not purport to be, and was not asserted to have been, granted on the basis of innocence). He precluded impeachment by a Maryland record of numerous offenses. The *Luck* hearing held here lasted over a full day. The court considered the arguments pressed and finally limited impeachment to one prior conviction, and as to that he also allowed assertion of the pardon and the circumstances of the conviction. His discretion was exceptionally well exercised; there clearly was no abuse.

15.

Broad discretion is vested in the trial judge in controlling cross-examination. The trial transcript constitutes abundant testimonial to the wide pale allowed appellants in this regard. They have no valid complaint in the trial judge's preclusion of

the divulgence of the name of a person known to Mrs. Gross. The name was not, and is not, shown to have the slightest materiality to this case, either directly or indirectly.

17.

Appellants' claim that they should have been given the entire grand jury transcripts is somewhat startling in view of the record, which shows no demand for additional transcripts. On the contrary, a multitude of grand jury transcripts, including, but not limited to, those covering the witnesses in this case "were made available very completely and minutely", as one appellant put it at trial. Appellants stated no complaint in the trial court with the exceptionally extensive previous disclosure. Their present vague complaint should be rejected.

### ARGUMENT

While appellee believes that many of appellants' seventeen enumerated points do not merit protracted treatment, for the convenience of the Court this brief has a corresponding heading and argument for each of appellants' points.

1. The trial judge did not err in reading to the jury the entire conspiracy count of the indictment, no part of which had been dismissed; alternatively, if the trial court did technically err, the error was harmless. In any event, appellants' express request that the trial judge not give a curative instruction precludes any assertion of prejudicial error on this appeal

(Tr. 2317, 2340-42; J.A. 93, 115-16)

As previously noted, Count One of the indictment charged both appellants with conspiracy. Count Three charged appellant Forte with endeavoring to influence Dorothy Birge, a witness in the abortion case (Crim. No. 741-61); on December 9, 1963, the District Court granted the Government's oral motion to dismiss Count Three. Count One, no part of which was at any time dismissed, consisted of seven numbered paragraphs in addition to a list of seventy-one overt acts committed in

furtherance of the conspiracy.<sup>16</sup> Paragraphs 1-3 of Count One alleged the background facts of the conspiracy. Paragraph 4 alleged the existence of a conspiracy among Laughlin, Forte, and Bernice Gross to defraud the United States and to commit the offenses of influencing a witness, perjury, and suborning perjury. Paragraph 5 alleged that one of the objects of the conspiracy was to influence Jean Smith as a witness in Crim. No. 741-61 and is quoted in the margin.<sup>17</sup> Paragraph 7 alleged that another object of the conspiracy was to obstruct the administration of justice in the United States District Court in the proceedings in Crim. No. 741-61.

Paragraph 6 of the conspiracy count was not dismissed. Nor was there any request by appellants or by the Government to dismiss this particular paragraph. Before the court charged the jury, a revised mimeographed indictment deleting only Count Three was handed to the trial judge; appellants offered no objection to any of its content. Counsel acquiesced in the revision. (Tr. 1301-02.) Also before charging the jury, the trial judge informed counsel that he would read Count One to the jury, dispensing with the recitation of the overt acts; again appellants voiced no objection (Tr. 2064; J.A. 460). Thus the trial judge read Paragraph 6 as part of the reading of the entire revised indictment (except for the overt acts) during his instructions to the jury (Tr. 2316-17; J.A. 93). The withdrawn count, Count Three, was not read and appellants are incorrect in stating that there was a "reading of a withdrawn count."

<sup>16</sup> J.A. —.

<sup>17</sup> 6. That it was also part of the said conspiracy that the said defendants and co-conspirators, well knowing, believing, and expecting and having reason to know well, believe, and expect that one Dorothy Lee Birge would be a material witness in the proceedings preliminary to, and in the trial of, Counts One and Two of *United States v. Allan U. Forte*, Criminal Case No. 741-61, to testify with respect to the matters set forth above in paragraph 3, including subparagraphs a, b, and c thereof, the said defendants and co-conspirators would and did corruptly endeavor to influence the said Dorothy Lee Birge by counseling, advising, suggesting, and persuading her to testify falsely to the aforesaid matters at said proceedings and trial. (J.A. 3.)

Dorothy Birge testified during the trial (Tr. 33-44) but her testimony related only to Forte and his attempts to influence Jean Smith through her; it did not relate to that aspect of the conspiracy revolving around the endeavor to influence Mrs. Birge herself, set out in Paragraph 6 of Count One. Thus, appellants' contention really is that in view of the lack of evidence as to this aspect of the conspiracy count, the trial judge committed reversible error in reading Paragraph 6 during the course of his charge. The contention should be rejected for at least three main reasons.

First, it was not required that every paragraph of the conspiracy count be supported by evidence before it could be read as returned by the grand jury. Appellants' contention is based on a fundamental misunderstanding of the law of conspiracy and the relation among the various counts of this indictment. The commission of a substantive offense and the conspiracy to commit it are separate and distinct offenses. *Callanan v. United States*, 364 U.S. 587, 593 (1961); *Pinkerton v. United States*, 328 U.S. 640, 643 (1946). It is immaterial whether offenses charged in the conspiracy count of an indictment are also charged and proved, or not charged or not proved, as substantive offenses. *Pinkerton v. United States*, *supra*, 328 U.S. at 644. A conspiracy is not the commission of the crime which it contemplates; it neither violates nor "arises under" the statute whose violation is its object. *United States v. Rabino-wich*, 238 U.S. 78, 87-89 (1915). In light of these principles, the dismissal of the substantive count of indictment (Count Three) did not affect the charge of conspiracy contained in Count One.<sup>18</sup>

It was not necessary that the Government prove each of the allegations of purpose to commit a substantive crime contained in Count One of the indictment.<sup>19</sup> It was necessary only that a

<sup>18</sup> See *Dunn v. United States*, 284 U.S. 390 (1932); *United States v. De Lucia*, 262 F. 2d 610 (7th Cir. 1958), *cert. denied*, 359 U.S. 1000 (1959); *United States v. Goodman*, 129 F. 2d 1009, 1012 (2d Cir. 1942); *Philbrook v. United States*, 117 F. 2d 632, 636 (8th Cir.), *cert. denied*, 313 U.S. 577 (1941); *Moorehead v. United States*, 270 Fed. 210, 213 (5th Cir. 1921).

<sup>19</sup> It might be noted that Count One was not duplicitous for alleging in a single count a conspiracy to commit several crimes. "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk v. United*

sufficient number of the allegations in Count One be proved to constitute a violation of the conspiracy statute, 18 U.S.C. § 371 (1964). See *Frazier v. United States*, 82 U.S. App. D.C. 332, 163 F. 2d 817 (1947), *affirmed*, 335 U.S. 497 (1948); *Myrick v. United States*, 332 F. 2d 279 (5th Cir. 1963), *cert. denied*, 377 U.S. 952 (1964). Therefore, even assuming that the proof failed to show the full sweep of the conspiracy alleged in the indictment, since that which was shown did come within its scope, there was no error in submitting the entire count to the jury. *Moss v. United States*, 132 F. 2d 875 (6th Cir. 1943). As was noted in *United States v. Mack*, 112 F. 2d 290 (2d Cir. 1940) (L. Hand, J.):

The objection is not good that the crime must be proved as laid in the indictment; it was enough to prove a conspiracy to commit any single one of the crimes charged, for the variance would not be material.

*Id.* at 291, citing *Berger v. United States*, 295 U.S. 78 (1935). See also *Neely v. United States*, 145 F. 2d 828 (5th Cir. 1944); *Jolley v. United States*, 232 F. 2d 83 (5th Cir. 1956). The trial judge did not err in reading Paragraph 6.

Second, it seems apparent that no prejudice could have resulted from the reading of Paragraph 6 in any event. Where it is clear (as the Counterstatement shows it was here) that the defendants committed a number of offenses to effect the object of the conspiracy, and it is thus inconceivable that the jury found them guilty only because of an allegation of purpose to commit an offense not proved, a failure of proof with respect to that purpose could not have been prejudicial. *Cf. Giardano v. United States*, 251 F. 2d 109, 115 (8th Cir. 1958), *cert. denied*, 356 U.S. 973 (1958); *Culp v. United States*, 131 F. 2d 93 (8th Cir. 1942); *DeLacey v. United States*, 249 Fed. 625 (9th Cir. 1918); *United States v. Boisvert*, 187 F. Supp. 781 (D.R.I. 1960).

All of the cases cited by appellants in support of their position (save one from California involving a "non-existent information") dealt with attempts to instruct the jury to dis-

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*States*, 249 U.S. 204, 210 (1919); *accord, Braverman v. United States*, 317 U.S. 49, 54 (1942); *Carrado v. United States*, 93 U.S. App. D.C. 183, 210 F. 2d 712 (1953), *cert. denied*, 347 U.S. 1018 (1954).

regard erroneously admitted *evidence* or with the admission of *evidence* of other crimes. Obviously these cases are not in point here, especially because the trial court in this case charged the jury that the indictment "raises no inference of guilt" and "is not evidence in the case" (Tr. 2305; J.A. 82-83). When this principle of law has been explained to the jury, "the court is not required to instruct the jury to disregard every allegation of the indictment upon which no proof is presented." *Shreve v. United States*, 103 F. 2d 796, 813 (9th Cir.), *cert. denied*, 308 U.S. 570 (1939) (mail fraud; no proof of an alleged misrepresentation); see *Stephan v. United States*, 133 F. 2d 87 (6th Cir.), *cert. denied*, 318 U.S. 781 (1943) (treason; no proof that harbored enemy was "spy" as alleged); *cf. Hunsaker v. United States*, 279 F. 2d 111 (9th Cir.), *cert. denied*, 364 U.S. 819 (1960) (allegation of conspiracy to defraud United States invalid, though other allegations of conspiracy to commit crimes valid and proved<sup>20</sup>).

Third and finally, appellants have waived any right to claim error on this appeal. They were put on full notice that the trial judge would read Count One to the jury, yet made no objection until after the count was read (see *supra*, p. 19). Even so, perhaps appellants might have been entitled to a cautionary or curative instruction at the end of the charge to the jury, but in a colloquy after the instructions the trial judge

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<sup>20</sup> It may also be that appellants might have been entitled to have Paragraph 6 withdrawn from the jury if they had moved in time for such relief. However, no motion to that effect was made. Especially in the absence of such a motion, the trial court does not commit reversible error when he reads an unproved allegation in his charge to the jury. Thus, in *United States v. Smith*, 112 F. 2d 83, 86 (2d Cir. 1940), the court said:

Clearly there was sufficient proof for the jury to convict on the charge of conspiracy to commit the first two offenses. It is elementary that the jury needed to find a conspiracy to commit only one of the four offenses, in order to convict. \* \* \* Appellant asked the court to take the issue of a conspiracy to commit the third offense \* \* \* away from the jury, and the court did so. Appellant neglected to request that the jury be similarly instructed to disregard the fourth offense \* \* \*, but she now claims that this part of the case should never have been submitted to the jury. Whether a conspiracy to commit that offense was shown under the circumstances here disclosed is a matter we need not now decide. Appellant's failure to request an instruction as to this offense was fatal. *United States v. Mascuch*, 2 Cir., 111 F. 2d 602.

asked if counsel wanted clarification on this point and was told that counsel did not want any explanation made.<sup>21</sup> Instead, appellants took the position that the entire trial should be voided, but as pointed out *supra* appellants were not entitled to a mistrial. Having requested that no further instructions be given on the point (a not unreasonable tactical choice), they cannot now be heard to protest that the trial court acceded to their plain demand. Compare *George v. United States*, 75 U.S. App. D.C. 197, 125 F. 2d 559 (1942). And having thus waived any right they may have had to a curative instruction and being unable to show prejudice to themselves, appellants are not entitled to reversal on this ground. *Pezznola v. United States*, 232 F. 2d 907 (1st Cir.), *cert. denied*, 352 U.S. 834 (1956); *United States v. Kushner*, 135 F. 2d 668 (2d Cir.), *cert. denied*, 320 U.S. 212 (1943); *Clarke v. United States*, 132 F. 2d 538 (9th Cir. 1942), *cert. denied*, 318 U.S. 789 (1943).

For these reasons appellants' assignment of error in this regard should be rejected.

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<sup>21</sup> Mr. GARBER: Your Honor, during the course of the instructions Your Honor was reading from the indictment and, as I recall, Your Honor read paragraph 6 on page 2.

The COURT: Yes.

Mr. GARBER: That referred to Birge.

The COURT: Yes.

Mr. GARBER: And that material was stricken out.

The COURT: It was not out of the copy I received, was it?

Mr. GARBER: Well, actually this referred to Count 3, which was dismissed.

The COURT: Do you want me to clarify it?

Mr. GARBER: I feel at this point that to call the jury's attention further to it would compound the effect that the reading of this might have. Therefore, on the basis of the Court's reading paragraph 6 of Count 1 of this indictment, referring to Birge and not referring to Smith, I would move for a mistrial.

The COURT: You don't want me to make any explanation?

Mr. GARBER: Your Honor, I feel if you made an explanation, it would only compound what has already been done.

The COURT: So therefore I understand you do not want me to make an explanation?

Mr. GARBER: I would not ask for an explanation.

The COURT: Mr. Laughlin, do you join in that?

Mr. LAUGHLIN: I join in that point, and I agree with that. It would be prejudicial as far as both defendants are concerned.

The COURT: Mr. Lowther?

2. The trial judge properly and fully instructed the jury on reasonable doubt, including an instruction to acquit if it had a reasonable doubt "after a consideration of all the evidence", and the court was not required to expressly charge that a reasonable doubt may arise from lack of evidence

(Tr. 2252, 2305-06)

Appellants also contest the refusal of the trial judge (Tr. 2052; J.A. 448-49) to give defendants' requested instruction No. 29, which read:

You are instructed that a reasonable doubt may arise from the evidence in the case and you are instructed that a reasonable doubt may arise from lack of evidence. [Emphasis added.]

Relying mainly on state cases, appellants argue that the absence of an express statement that a reasonable doubt may arise from lack of evidence constitutes reversible error.<sup>22</sup> Appellee does not quarrel with the abstract proposition embodied in that latter aspect of the proposed instruction, but the question is whether the trial judge was *required* to give such an instruction.

Most of the cases in this Court and in the Supreme Court involving other aspects of the reasonable doubt instruction have silently assumed that a "lack of evidence" instruction is not required.<sup>23</sup> In any event, the short answer to appellants' con-

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Mr. LOWTHER: There is no grounds for mistrial here, sir.

The COURT: I deny the motion for mistrial.

As I understand, both counsel do not want any explanation made of the paragraph 6, and I will not make any.

You don't want any explanation made either, of paragraph 6, Mr. Lowther?

Mr. LOWTHER: No, sir. (Tr. 2340-42; J.A. 115-16.)

<sup>22</sup> It should be noted that this is not a case in which evidence of the crimes charged was lacking. Viewed in appellants' most favorable light, there *was* evidence, but it was evidence which the jury might disbelieve. The proposed instruction hardly involved a situation which was crucial insofar as the instant case is concerned.

<sup>23</sup> See, e.g., *Holt v. United States*, 218 U.S. 245, 254 (1910) ("after going over in your minds the entire case, giving consideration to all the testimony and every part of it"); *Hopt v. Utah*, 120 U.S. 430, 439 (1887) ("after an im-

tention is that the identical argument pressed here was advanced only recently<sup>24</sup> and was rejected by this Court, which found no error after consideration of appellant's arguments. *Petite v. United States*, D.C. Cir. No. 19190, decided November 15, 1966 (unprinted)<sup>25</sup>.

In fact, appellants' argument is not only contrary to the authority in this jurisdiction, it is also against the weight of authority elsewhere. A very few state courts have held that a

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partial comparison and consideration of all the evidence"); (*Robert*) *Moore v. United States*, 120 U.S. App. D.C. 203, 204, 345 F. 2d 97, 98 (1965) ("after careful and candid and impartial consideration of all the evidence"); *Egan v. United States*, 52 App. D.C., 384, 393, 287 Fed. 958, 967 (1923) ("after a candid and impartial investigation of all the evidence"); *United States v. Heath*, 20 D.C. (9 Mackey) 272, 288 (1891) ("after hearing all the evidence"). See also Manual on Uniform Jury Instructions in Federal Cases, 33 F.R.D. 567.

<sup>24</sup> See Brief for Appellant in *Petite v. United States*, D.C. Cir. No. 19190, at pp. 17-19.

<sup>25</sup> In *Bishop v. United States*, 71 App. D.C. 132, 107 F. 2d 297 (1939), cited by appellants, this Court, affirming a conviction, approved a reasonable doubt instruction based on the opinion in *Egan v. United States*, 52 App. D.C. 384, 287 Fed. 958 (1923). In *Egan*, the Court had defined a reasonable doubt as "such doubt as will leave the juror's mind, after a candid and impartial investigation of all the evidence, so undecided that . . ." etc. *Id.* at 393, 287 Fed. at 967. No explicit reference to "lack of evidence" was included. In *Bishop*, however, though approving of *Egan*, the Court again undertook to define reasonable doubt, this time saying, "reasonable doubt is a doubt arising from the evidence, or from a lack of evidence, after consideration of all the evidence. It is not a vague, speculative, imaginary something, but just such doubt as would cause reasonable men to hesitate to act upon it in matters of importance to themselves." 71 App. D.C. at 138, 107 F. 2d at 303. The "lack of evidence" phrase was not included in response to any of the issues in the case. It appears to have been borrowed from the charge reviewed in *Poscy v. State*, 18 Ala. App. 583, 93 So. 272 (1922), which itself had not seen fit to discuss the "lack of evidence" matter. Thus, "lack of evidence" phraseology crept into the *Bishop* opinion without argument or apparent consideration. Of course, *Bishop* is still good law on the subject of "hesitation to act." But none of the cases that have cited it recently have done so for the proposition that "lack of evidence" must be included in a charge to the jury on reasonable doubt. See, e.g., *Holland v. United States*, 348 U.S. 121, 140 (1954), cited by appellants; *McGill v. United States*, 121 U.S. App. D.C. 179, 184, 348 F. 2d 791, 796 (1965); *Scurry v. United States*, 120 U.S. App. D.C. 374, 375, 347 F. 2d 468, 469 (1965); *Jones v. United States*, 119 U.S. App. D.C. 213, 215, 338 F. 2d 553, 555 (1964). Moreover, although *Bishop* says that a reasonable doubt may arise from lack of evidence, it does not say or even imply that the jury must be explicitly instructed to that effect. The decision in *Petite* puts the matter to rest.

charge which permits the jury to acquit only upon a reasonable doubt "founded on the evidence" or "arising from the evidence" is erroneous because it does not give full effect to doubt arising from lack of evidence; that is, it focuses on the credibility of the evidence to the exclusion of its sufficiency. See *State v. Anderson*, 209 Iowa 510, 228 N.W. 353 (1929) (5-4 decision); compare *State v. Walker*, 33 N.J. 580, 166 A.2d 567 (1960) (instruction required), with *State v. Hudson*, 38 N.J. 364, 185 A.2d 1, cert. denied, 371 U.S. 850 (1962) (not reversible error to omit instruction). However, the vast majority of courts, both federal and state, reject "the proposition that the jury must be charged in so many words that a reasonable doubt may arise from the lack of evidence." *State v. Hudson*, 38 N.J. 364, 374-79 185 A.2d 1, 6-9, cert. denied, 371 U.S. 850 (1962) (exhaustively reviewing the authorities) (unanimous court); see, e.g., *Ashe v. United States*, 228 F. 2d 725, 730 (6th Cir. 1961); *Singer v. United States*, 278 Fed. 415, 418 (3d Cir.), cert. denied, 258 U.S. 620 (1922); *People v. Radcliffe*, 232 N.Y. 249, 133 N.E. 577 (1921); *Commonwealth v. Evancho*, 175 Pa. Super. 225, 103 A.2d 289, aff'd, 379 Pa. 273, 108 A.2d 719 (1954).<sup>26</sup>

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<sup>26</sup> The reasoning of these decisions is exemplified by Judge Pound's opinion in *People v. Radcliffe*, *supra* in text:

We may assume that they [the jurors] possessed sufficient intelligence to understand . . . that they were to consider, not only the evidence that was given in the case but also whether there was an absence of material and convincing evidence. "Any reasonable doubt founded on the evidence" means "any reasonable doubt arising out of the evidence or lack of evidence." Defendants were not entitled to select the phraseology, so long as the thought was once fairly expressed in the language of the judge.

232 N.Y. at 254, 133 N.E. at 578.

In *Ashe v. United States*, *supra* in text, the Court of Appeals for the Sixth Circuit affirmed a conviction, saying that although the trial court did not use the words "lack of evidence":

From hearing his entire charge relating to the government's burden to prove all of the essential elements of the offense charged by direct or circumstantial evidence beyond a reasonable doubt, the jury could not fail to understand that a reasonable doubt could arise from a "want of evidence" as well as from the positive evidence.

288 F. 2d at 730.

In the instant case, the trial judge's instructions on reasonable doubt and the presumption of innocence<sup>27</sup> measure well against the "exemplary charge" in *(Robert) Moore v. United States*, 120 U.S. App. D.C. 203, 345 F. 2d 97 (1965). Surely the jury understood from the instruction that its task was to decide whether there was evidence in the case which convinced them of appellants' guilt beyond a reasonable doubt. Appellants' contention in this regard should be rejected both on authority and reason.

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<sup>27</sup> The trial judge charged:

Every defendant in a criminal case is presumed to be innocent, and this presumption of innocence attaches to each defendant in this case throughout the trial. The burden is on the Government to prove a defendant guilty beyond a reasonable doubt, as to every element of the offense, as those elements will be defined; and if the Government fails to sustain that burden, then you must find the defendants not guilty.

You may well ask what is meant by the phrase, "a reasonable doubt." It does not mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty, and not necessarily proof to a mathematical certainty. A reasonable doubt is one which is reasonable *in view of all the evidence*. Therefore, if after an impartial comparison and consideration of all the evidence you can candidly say that you have such a doubt as would cause you to hesitate to act in matters of importance to yourselves, then you have a reasonable doubt. But if after such impartial comparison and consideration of all the evidence, and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt such as you would not hesitate to act upon in the more weighty and important matters relating to your personal affairs, then you have no reasonable doubt. [Emphasis supplied.]

Tr. 2305-06; J.A. 83. See also, e.g., Tr. 2325; 2328, 2329, 2334-35, particularizing reasonable doubt requirement for various elements and facets.

3. The telephone company records were not rendered inadmissible in the trial on this indictment because of an earlier ruling by a different judge in another case, who held only that as a matter of law these records were in and of themselves insufficient to render necessary corroboration to support a different indictment for a different, special type of offense

(Tr. 1203, 1211-20, 1381-86)

Appellants contest the admissibility of the telephone company records on the single ground of collateral estoppel.<sup>28</sup>

The conspiracy count of the indictment alleged that seventy-one overt acts were committed in furtherance of the conspiracy. A large number of these acts consisted of telephone calls between appellants and Mrs. Gross. (See J.A. 4-13; *supra*, n. 11.) Appellants now maintain that the telephone company records offered to corroborate these conversations should not have been received in evidence at trial because Judge Curran is alleged to have found them inadmissible evidence when he decided *United States v. Laughlin*, 226 F. Supp. 112 (D.D.C. 1964), *considering motion to vacate prior order in* 223 F. Supp. 623 (D.D.C. 1963) (perjury indictment in Crim. No. 599-63). Appellants seek to have that ruling apply as "collateral estoppel" in the present case, but in so arguing they completely misconstrue the nature of Judge Curran's ruling and the issue involved there.

All relevant portions of the opinions of Judge Curran are set out in the Appendix to this brief (*infra*, pp. 1a-5a). Those opinions show that the question before Judge Curran was not at all the question involved here. Having agreed with Judge Youngdahl that the March 1963 tape recordings were not admissible in the perjury case (Crim. No. 599-63), the issue before Judge Curran was whether there was still enough evidence before the grand jury to sustain the perjury indictment in view of what he deemed to be the requirements for a perjury conviction, *i.e.*, two witnesses or one witness plus convincing cor-

<sup>28</sup> The trial judge in the instant case rejected appellants' collateral estoppel argument (see Tr. 1203, 1211-20, 1381-86).

roboration. Judge Curran's entire discussion of the record slips was in the context of that issue. He determined that in his view the quantum of evidence supplied by the records was not corroboration sufficiently strong to satisfy the special perjury rule since there was nothing to verify who had made or received the calls at the numbers shown on the records. Thus Judge Curran dismissed the perjury indictment in Crim. No. 599-63.<sup>29</sup>

In short, Judge Curran's ruling concerned the *sufficiency* of these records for *one special and unusual purpose*. But appellants' argument here is as to the *admissibility* of these records for *another purpose*. There is no relationship between the two questions. Judge Curran did not resolve, or purport to resolve, any admissibility issue against the Government, as appellants would portray him as having done. (Indeed, Judge Curran apparently assumed that the records were admissible.<sup>30</sup>) Thus the doctrine of collateral estoppel, which applies only to issues resolved by a final judgment in a prior legal action, has no application whatever to this case since the previously litigated and determined issue is not that involved here. See, e.g., *Yates v. United States*, 354 U.S. 298, 336 (1957); *United States v. Int'l Bldg. Co.*, 345 U.S. 502, 503 (1953); *Tait v. Western Md. Ry. Co.*, 289 U.S. 620, 623 (1933); *Troxell v. Del., Lackawana & Western R.R. Co.*, 227 U.S. 434, 440 (1913). *John Moore v. United States*, 120 U.S. App. D.C. 173, 344 F. 2d 558 (1965); *Laughlin & Forte v. United States*, 120 U.S. App. D.C. 93, 344 F. 2d 187 (1965).<sup>31</sup> The trial judge so concluded (Tr. 1383-86).

<sup>29</sup> At the same time he also ruled adversely on appellants' motion to dismiss the instant conspiracy indictment for an alleged insufficiency of evidence supporting the indictment. See *supra*, note 4.

<sup>30</sup> Had Judge Curran found them inadmissible he would not have had to determine whether they sustained the indictment. Moreover, the fact that appellants have been able to advance no plausible legal argument why the records would be inadmissible discredits any notion that Judge Curran held them legally inadmissible.

<sup>31</sup> See also *DeSollar v. Hanscomb*, 158 U.S. 216, 221 (1895) ("It is the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment"); *Kelliher v. Stone & Webster*, 75 F. 2d 331, 333 (5th Cir. 1935 (for doctrine to apply, necessary that record of former action "show with certainty" that fact or issue was "indeed litigated and decided on merits."); (*John Moore v. United States*, *supra* in text (similar).

Furthermore, even if the questions before the trial judge in this case and before Judge Curran in the other case had been identical, the doctrine of collateral estoppel would have no bearing. The doctrine operates to bar only relitigation of issues of *fact*. See, e.g., (*John*) *Moore v. United States*, 120 U.S. App. D.C. 173, 175, 344 F. 2d 558, 560 (1965); *Laughlin & Forte v. United States*, 120 U.S. App. D.C. 93, 97-98, 344 F. 2d 187, 191-92 (1965). The issue before Judge Curran was one of *law*.<sup>32</sup>

Appellants cannot meet their burden<sup>33</sup> of showing that a "fact" in question was determined by the prior ruling.

1. This Court has already rejected appellants' argument in regard to "grand jury bias"; it need not consider it again

Appellants' brief urges that the grand jury was biased to such a degree that the indictment must be dismissed.<sup>34</sup> While a perusal of the entirety of even the limited grand jury transcripts in this record (not just the limited, out-of-context portions quoted in appellants' brief) totally belies appellants' factual premise, appellants' are foreclosed from raising the issue on this appeal.

Before the trials, appellants moved to dismiss the indictment in this case several times. One such motion was filed on April, 1964, heard on April 14-15, and denied on April 15, 1964 (see Docket).<sup>35</sup> In appellants' prior appeal from their first convic-

<sup>32</sup> Even if the issue of admissibility had been decided by Judge Curran, between judges of the same court, there is always the power to depart from earlier rulings on questions of law. *Dictograph Prod. Co. v. Sonotone Corp.*, 230 F. 2d 131, 134-36, rehearing denied, 231 F. 2d 867 (2d Cir.), cert. dismissed by stipulation, 352 U.S. 883 (1956).

<sup>33</sup> (*John*) *Moore v. United States*, 120 U.S. App. D.C. 173, 175, 344 F. 2d 558, 560 (1965).

<sup>34</sup> Apparently, appellants' unarticulated underlying assumption is that "but for" the alleged bias the grand jury would not have found probable cause to bring appellants to trial. Since appellants have been found guilty of the charges in the indictment in a full-scale trial, the assumption that probable cause did not exist is baseless. Cf. *Bluc v. United States*, 119 U.S. App. D.C. 315, 322, 342 F. 2d 894, 901 (1964), cert. denied, 380 U.S. 944 (1965).

<sup>35</sup> The most recent attempt to have the indictment dismissed was in the interim between this Court's remand by opinion of February 11, 1965 and the retrial here appealed from, i.e., by motion filed May 7, 1965 and denied May 24, 1965. That motion — which is not the one contained in the Joint Appendix (p. 61-A) on this appeal — did not rest on alleged

tions on this same indictment, appellants pressed at great length the exact contention now raised, based on the same previously denied motion now relied upon. See Brief for Appellants in D.C. Cir. Nos. 18711, 18712, pp. i, 102-13, 123. On this premise appellants sought for this Court to order that the indictment be dismissed. *Id.* at 113, 125. This Court, however, rejected appellants' argument regarding alleged "grand jury bias"; it reversed the conviction on other grounds but remanded the case and did not direct dismissal of the indictment. On the contrary, the decision clearly contemplated retrial. See *Laughlin & Forte v. United States*, 120 U.S. App. D.C. at 99-100, 344 F. 2d at 193-94 (dealing with which trial judge should handle the case on remand and mentioning also the problem of appellant Laughlin continuing as counsel for co-defendant Forte).

Accordingly, this Court has already ruled adversely on appellants' point and, in view of the absence of material facts not previously adduced or relevant supervening law, appellants are without warrant to relitigate this Court's ruling. See, *e.g.*, *Naples v. United States*, 120 U.S. App. D.C. 123, 125, 344 F. 2d 508, 510 (1964), and — U.S. App. D.C. —, 359 F. 2d 226 (1966) (on motion to amend and clarify opinion).

##### 5. No evidence introduced at trial was the fruit of any "poisonous tree"

Pointing to no place in the record where this contention was raised below, appellants argue that "the unlawful recordings gave rise to this case"; they also argue "the testimony of Mrs. Gross was coerced." The latter point, that Mrs. Gross' testimony was coerced, is dealt with elsewhere in this brief (see Argument 7, *infra*). The other aspect of appellants' contention relates to the tapes on which were recorded four telephone calls between Bernice Gross and appellant Laughlin on March 1, 1963, March 13, 1963 and March 18, 1963.<sup>36</sup> These recordings were *not* introduced at this trial.

grand jury bias. Instead, it claimed that there was insufficient evidence before the grand jury to sustain the indictment, a point previously rejected (in 223 F. Supp. 623, 626 (D.D.C. 1963)) before the first trial and appeal.

Accordingly, the argument, not having been first made to the trial judge, would be improperly presented here in any event.

<sup>36</sup> See *United States v. Laughlin*, 222 F. Supp. 264 (D.D.C. 1963) (Youngdahl, J.).

Originally, the recordings had been introduced in the first trial of appellant Laughlin for perjury in Crim. No. 599-63, but Judge Youngdahl later declared a mistrial, holding that those recordings had been made without the valid consent of Mrs. Gross and were therefore inadmissible under the Communications Act, 47 U.S.C. § 605;<sup>37</sup> the indictment in Crim. No. 599-63 was subsequently dismissed by Judge Curran on the basis that without the recordings there was insufficient evidence to fulfill the special two-witness rule applicable to perjury cases.<sup>38</sup> Later the recordings were introduced into the first trial of the instant case (Crim. No. 600-63), and this Court held that the Government had been collaterally estopped from relitigating the question of Mrs. Gross' consent to the recordings.<sup>39</sup>

The tape recordings thus serving as an "illegal tree", appellants' thesis is that all other evidence in the case is the fruit of those tape recordings. This involuted "fruit of the poisonous tree" argument confuses the fruit with the tree and concludes that latter illegality can taint prior, legally acquired evidence. There is no such rule. The dates of the recordings (March 1963) show that the tapes were procured *after* the acts constituting the offenses involved here had been committed and after the conspiracy had ended. It was to Mrs. Gross' knowledge of these prior actions, the evidence of which she had completely exclusive of the recordings, that Mrs. Gross testified.<sup>40</sup> Even the conversations themselves, as distinguished

<sup>37</sup> *United States v. Laughlin*, 222 F. Supp. 264 (1963) (Youngdahl, J.).

<sup>38</sup> *United States v. Laughlin*, 223 F. Supp. 623 (1963) (Curran, J.).

<sup>39</sup> *Laughlin & Forte v. United States*, 120 U.S. App. D.C. 93, 344 F. 2d 187 (1965).

<sup>40</sup> In fact, Mrs. Gross herself was part of the March 1963 conversations with appellant Laughlin and was in valid possession of exactly the same conversations as were contained on the tape recordings. Thus, she could have testified to the March 1963 telephone conversations themselves, as long as she did not rely on the recordings which had been held to be an invalid interception of the call. Nevertheless, Mrs. Gross did not in any way testify concerning these calls. At one point Government counsel intended to question Mrs. Gross about these calls but later decided to abandon his request to be allowed to do so (Tr. 215-17, 349, 360; J.A. 146-47, 246).

from the tape recordings, added nothing new to Mrs. Gross' knowledge.<sup>41</sup>

Noteably and totally absent from appellants' brief is a single, valid designation of any testimony or evidence given in this trial which was derived in any way from the March 1963 tapes. The "tree" was, in fact, barren and the trial is devoid of any evidence " 'come at by exploitation of that illegality' ".<sup>42</sup>

Appellants' argument is totally lacking in substance.

**6. Appellants' allegations that several statutes were violated by the Government, even if true, could have no effect on this trial**

Relying on material quoted out-of-context from the first trial of this case, appellants allege that there were Government violations of the Internal Revenue Code, the Federal Communications Act, and FED. R. CRIM, P. RULE 6(e). They attempt to charge, try, and convict a Government official of those alleged violations on the selected excerpts in their brief. Appellants do not articulate the desired remedy, but apparently seek reversal of their convictions of conspiracy and influencing a witness not based on evidence derived from the violations alleged. The argument is raised for the first time on this appeal and does not warrant lengthy discussion.

Notably, appellants have failed to cite a single authority for their contention of error on this point. If evidence is gathered in violation of a statute, the proper remedy, at best, is to exclude that evidence. See, e.g., *Nardone v. United States*, 302 U.S. 379 (1937), 308 U.S. 338 (1939). But appellants point to no evidence procured or introduced at their trial as a result of the actions which they allege to be illegal<sup>43</sup> and even where there is a proven violation of a statute, to appellee's knowledge no principle of law or reason holds that any slip in any

<sup>41</sup> See transcripts of the tape recordings, contained in the record of the first trial. A sampling of the conversations is set out in this Court's prior opinion in this case, 120 U.S. App. at 98-99 n. 23, 344 F. 2d at 192-93 n. 23.

<sup>42</sup> *Wong Sun v. United States*, 371 U.S. 471, 488 (1963), citing *MAGUIRE, EVIDENCE OF GUILT*, 221 (1959).

<sup>43</sup> The tape recordings which Judge Youngdahl previously held to have been unlawful, unconsented to interceptions in violation of the Federal Communications Act, 47 U.S.C. § 605 (222 F. Supp. 264 (1963)), were not introduced at this trial, as previously noted.

regard by a Government official acts as an automatic grant of immunity to a defendant in spite of the fact that he can be proven guilty on competent evidence. Appellants, of course, have furnished no authority for such an irrational rule. They are totally unable to supply any nexus between their allegations and their convictions.

Thus, even assuming the violations alleged were proven true, appellants could not void their convictions by attempting to place someone else on trial in this Court.

**7. Appellants' unproven allegations of coercion of the witness, Mrs. Gross, were strictly matters for the jury to consider in determining credibility**

(Tr. 201-04, 217-22, 227-30 J.A. , 147-52, 156-60)

At trial appellants attempted to prevent Mrs. Gross from testifying, contending that, in spite of her desire to testify, she was being coerced to do so. The trial judge rejected the argument. (Tr. 201-04, 217-22.) In doing so he ruled rightly and in conformity with this Court's rulings.

There is, of course, no determination that Mrs. Gross' testimony at trial was coerced.<sup>4</sup> On the contrary, before Mrs. Gross testified the trial judge again advised her of her rights, specifically advising her that she was not compelled to testify against herself. Mrs. Gross, a former policewoman, indicated her understanding of her rights and affirmed that she was willing to testify. (Tr. 228, 230; J.A. 157-60.)

Furthermore, even if appellants had shown that Mrs. Gross had been coerced into testifying, appellants would not have standing to object to her testimony. *Long, Earle & Huff v. United States*, — U.S. App. D.C. —, 360 F. 2d 829, 834

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<sup>4</sup> Several of the factual statements in appellants' brief on this point (pp. 36-37), are not supported by the record and appellee would dispute both them and the conclusions drawn. But no matter what conclusions appellants would have the Court draw from their presentation of *pretrial* activities concerning Mrs. Gross, none of that recitation bears on the voluntariness of Mrs. Gross' testimony *during trial*.

(1966);<sup>45</sup> see *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).<sup>46</sup> Appellants were, of course, free to present the background of Mrs. Gross' testimony to the jury as bearing on credibility. *Long, Earle & Huff v. United States*, *supra*. The trial judge expressly so ruled in deciding the issue (Tr. 222, 227; J.A. 152, 156) and appellants elicited much testimony along these lines in an attempt to discredit Mrs. Gross' credibility (see, e.g., Tr. 714-15, 752-53, 891-902, 1130-31, 2147-49; J.A. 297-302, 370, 385, 469-70).

In conjunction with these precise considerations the trial judge extensively instructed the jury concerning credibility.<sup>47</sup> The considerations now urged as absolutes on this Court by appellants were factors for the consideration of the jurors who heard and saw the witness. They credited her testimony.

8. Since appellants were supplied with the statements about which they now complain and since they used those statements for impeachment purposes, their argument that the Jencks Act was violated is without substance

(Tr. 429-34, 666, 759-63, 768-71, 774-79, 784-860, 863-71, 902-11, 950-51; J.A. 278-82, , 307-62, , )

Appellants advance the argument that there was a violation of the Jencks Act<sup>48</sup> in this case in connection with Mrs. Gross' statements contained in two tape recorded telephone calls between her and Detective Wallace. Appellants assert, without reference to any point in the record, that Detective Wallace and Mrs. Gross both refused to divulge the contents of these

<sup>45</sup> Appellants are mistaken in saying (Brief for Appellants, p. 36) that the question has never been passed upon by any federal court.

<sup>46</sup> See also *People v. Portelli*, 15 N.Y. 2d 235, 257 N.Y.S. 2d 931, 205 N.E. 2d 857 (1965), *cert. denied*, 382 U.S. 1009 (1966).

<sup>47</sup> E.g., motives of witnesses (Tr. 2308; J.A. 85); animosity, friendship and other human factors (Tr. 2308; J.A. 85); bias and prejudice (Tr. 2308; J.A. 86); prior inconsistent statements of Mrs. Gross (Tr. 2310; J.A. 87); receiving Mrs. Gross' testimony with caution (Tr. 2311; J.A. 87-88); danger of uncorroborated testimony of accomplice (Tr. 2311; J.A. 88); testimony of admitted perjurer should be considered with caution (Tr. 2311; J.A. 88); fear of prosecution, and expectation of leniency by the grand jury and United States Attorney's Office (Tr. 2311-12; J.A. 88).

records.<sup>49</sup> Appellants then argue in their printed brief that appellants were entitled to use the transcripts but could not do so because they were illegal. Accordingly, they continue, the testimony of Mrs. Gross should have been stricken. As far as the record shows, this argument is advanced for the first time on appeal, no such request to strike being apparent at trial.

The phone calls to which appellants refer were two separate calls, made within minutes of each other.<sup>50</sup> The first was from Mrs. Gross to Detective Wallace, the second was from Wallace to Gross. Both occurred on July 24, 1963 and were tape recorded in Mrs. Gross' home. (Tr. 756-57, 759-63, 768-71, 791; J.A. , , , , .)<sup>51</sup>

Putting aside other defects in appellants' contentions, the argument is fundamentally defective in that it is based on an inaccurate view of the record. The record shows that the transcripts of these conversations *were* in the possession of appellants prior to and at trial and that the transcripts *were* used by appellants in an attempt to impeach Mrs. Gross.

At trial, all parties agreed that the tape recordings should be treated as Jencks Act statements (Tr. 430-31). It was acknowledged by appellant Laughlin that the tape recordings in issue had been played during a hearing outside the presence of the jury at the first trial (Tr. 850-51; J.A. 362; see also Tr. 429-34).<sup>52</sup> Appellants had a copy of the transcript of those recordings (see, *e.g.*, Tr. 775; J.A. 303). Furthermore, the recordings were played and discussed extensively outside the presence of the jury during this trial (Tr. 784-863). Indeed, in the course of a separate point, appellants' printed brief acknowledges that "these recordings were made available under the Jencks Act . . ." (printed Brief for Appellants, p. 46-A.)

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<sup>49</sup> Appellants also assert, without reference to the record, that neither party to the call consented to the recordings. There has, of course, never been any finding as to the validity of Mrs. Gross' consent to the tape recording of these calls in her home.

<sup>50</sup> It might be pointed out that appellants' quotations from the conversations (Brief for Appellants, p. 38) are taken completely out of context.

<sup>51</sup> See also the transcript of trial proceedings during the first trial of this case, pp. 348-49.

<sup>52</sup> That playing of the recordings can be found in the transcript of the trial proceedings of April 21, 1964, at the first trial, pp. 348-49, 364-79.

Thus these "statements" by the witness Mrs. Gross were in the possession of appellants.

Appellants in fact did use the statement in cross-examining Mrs. Gross (Tr. 774-75, 902-03; J.A. 302-03, ),<sup>53</sup> although by stating in their brief that "the defense could not utilize the contents" and "we are entitled to the use of the contents" (p. 39) appellants imply that they did not use these statements.<sup>54</sup>

Under these circumstances appellants eighth contention has no substance in fact or law.

#### 9. Appellants' "public policy" argument is without merit

Appellants' argument headed "Public Policy" does not merit extended consideration. Appellee would first contest the legal conclusions which appellants *sua sponte* impose on their view of facts asserted. In any event, their argument in this regard affixes itself to the vague term "Public Policy" and claims that certain alleged situations show a "disregard for the rights of an accused". (Apparently, by "an accused" they mean Mrs. Gross, who was not a defendant.) None of the incidents concern appellants' rights; those mentioned all deal with Bernice Gross. Appellants obviously have no standing of any nature to assert allegedly violated rights of Mrs. Gross. See, *e.g.*, *Wong Sun v. United States*, 371 U.S. 471, 492 (1964); *Long, Earle & Huff v. United States*, U.S. App. D.C. , 360 F. 2d 829, 833, 834 (1966).

#### 10. Appellants' contention that there was a "lack of fundamental fairness" is devoid of merit and without meaning

While appellants state that to prevail on this point it is necessary to show that the trial was unfair,<sup>55</sup> the contentions advanced under their "Lack of Fundamental Fairness" head-

<sup>53</sup> Appellants attempted to use the telephone transcripts for impeachment at other points but on several occasions the trial judge could find no inconsistency between the trial testimony and the transcript statement. See, *e.g.*, Tr. 904-11.

<sup>54</sup> As the references in text show, appellants had no hesitancy in using the statements, based either on the now-alleged illegality or any other reason. In fact, at trial appellants insisted on their right to use the statements in cross-examining Mrs. Gross (Tr. 606).

<sup>55</sup> Brief for Appellants, p. 42.

ing have nothing to do with the fairness of the trial. On the contrary, the scrupulously fair conduct of this trial by the trial judge, vividly reflected in the record, belies any allegation that appellants' trial fell short of due process of law. Most of the contentions urged by appellants in this contention are simply a rehearsal of points advanced elsewhere and add nothing to those other arguments.

**11. There was abundant evidence to support the jury's finding of a conspiracy and the trial judge correctly denied appellants' motions for acquittal**

Appellants' contention that there was no evidence of a conspiracy merits scant attention. The trial judge fully instructed the jury on conspiracy (Tr. 2318-31; J.A. 94-106) and even the limited recitation of evidence is abundantly sufficient to sustain the jury's finding that appellants were guilty of the conspiracy charged in Count One.<sup>56</sup> It is a familiar principle that the evidence presented must be viewed in the light most favorable to the Government at this post-verdict stage.<sup>57</sup>

So viewed, the evidence is not only ample, it is overwhelming.<sup>58</sup>

<sup>56</sup> A conspiracy under 18 U.S.C. § 371 (1964) is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose, or to accomplish by criminal or unlawful means some purpose not in itself criminal or unlawful, attended by an act by one or more of the conspirators to effect the object of the conspiracy. See, e.g., *United States v. Falcone*, 311 U.S. 205, 210 (1940); *Pinkerton v. United States*, 145 F. 2d 252 (5th Cir. 1944); *Cooper v. O'Connor*, 69 App. D.C. 100, 99 F. 2d 135, *cert. denied*, 305 U.S. 642 (1938); 18 U.S.C. § 371 (1964).

<sup>57</sup> *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229, *cert. denied*, 331 U.S. 837 (1947); *Morton v. United States*, 79 U.S. App. D.C. 329, 147 F. 2d 28, *cert denied*, 324 U.S. 875 (1945).

<sup>58</sup> Appellants apparently seek to have all of Mrs. Gross' testimony ignored by citing cases to the effect that conspiracy "declarations" by a co-conspirator are admissible against other conspirators-defendants only if there is independent evidence that the defendant participated in the conspiracy. In so doing, appellants seemingly hope to characterize Mrs. Gross' live courtroom testimony as the "declarations" of a co-conspirator; that characteriza-

**12. As to appellant Forte alone—The trial judge did not err in denying Forte's requested instruction No. 36, which was belated, erroneous and not required**

(Tr. 471-73, 869-70, 906, 1929-30, 2047-2104, 2340, 2343-44; J.A. 289-90, 364, 370, 431-32, 445-66, 114, 117-18).

The subject of proposed instructions was discussed by the trial judge with counsel on numerous occasions before the actual charge and the parties were repeatedly urged to hand up their requests (Tr. 471-73, 869-70, 906, 1929-30, 2047; J.A. 289-90, 364, 370, 431-32, 445-60, 114, 117-18). Before the charge, appellants requested 33 joint instructions (see Tr. 2048). The trial judge ruled on each of these, granting some, modifying others, and denying still others (see Tr. 2049-57). (The instruction now in issue was not among them.) The trial judge then previewed in detail his charge (Tr. 2058-85); counsel were afterwards given additional opportunity to make suggestions as well as objections; and the court made several changes in the planned charge at counsels' request (*e.g.*, Tr. 2099-2100; J.A. 462-63). Appellant Forte's counsel was asked if he had anything pertinent to raise and stated he had nothing more at that point (Tr. 2103; J.A. 466). At the request of counsel, the court did not preclude further requests, leaving the matter open until the morning of the next trial day, a Monday (Tr. 2104). Following the weekend, the subject of proposed instructions was again reopened by counsel (Tr. 2156); again the trial judge heard requests for changes (Tr. 2162). During the course of the ensuing discussion and in regard to an unrelated request, appellant Laughlin cited to the court language involving en-

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tion is wholly erroneous. The "declarations" referred to in the cases cited obviously refer to out-of-court declarations of a co-conspirator. It is true that a co-conspirator can only be convicted upon substantial proof of his own words and deeds and not alone upon hearsay declarations of a co-conspirator. *E.g.*, *Glasser v. United States*, 315 U.S. 60, 70 (1942); *United States v. Russo*, 257 F. 2d 712, 713 (2d Cir. 1958). Here, however, appellants' convictions did not rest on hearsay declarations by Mrs. Gross. They rested on her live testimony in court which, if believed, was sufficient to establish their guilt beyond any reasonable doubt.

See also Argument 16, *infra*, dealing with similar contentions of appellants.

trapment, whereupon the court asked counsel for appellant Forte if he was asking that such a defense be put forth. Forte's counsel replied that he was not (Tr. 2169-70). Shortly thereafter counsel for Forte was asked if he wanted to add anything (Tr. 2176) and he mentioned several other instructions but made no request for any instruction elaborating a "theory of defense".

The next morning the court charged the jury. Only after the conclusion of that often-discussed charge and only when the trial judge asked for *objections* did counsel for Forte request the instruction now alleged to have been fatally denied. He approached the bench and asked that the court instruct the jury "on Forte's theory of defense". The trial judge, apparently surprised, noted counsel's previous reaction when the subject of a defense theory of entrapment had been broached. (Tr. 2343). Counsel disclaimed again any theory of entrapment and then for the first time asked "that the jury be instructed, as Forte testified, his relation with Mrs. Gross was instigated by Mrs. Gross, and the purpose of their meeting and telephone conversations was for Mrs. Gross to supply Forte with information concerning one Samuel Wallace" (Tr. 2343). The trial judge denied the request, stating that counsel wanted him to argue Forte's case that morning, and Forte's attorney placed in the record a handwritten instruction which the court labeled No. 36 (Tr. 2344) (see J.A. 117-18). It is now alleged that the court committed reversible error in this regard.

In the first place, Forte's request was exceptionally ill-timed. FED. R. CRIM. P. 30 provides that counsel shall file written requests at the close of the evidence or such earlier time as the court requests. The trial judge was extremely fair in allowing opportunity for timely requests. He gave appellants ample opportunity to make such requests as late as noon on the day before the morning of the charge. He gave Forte's counsel more than adequate opportunity to request any instruction on a theory of defense, even touching on the subject without occasioning a timely response (see Tr. 2169-70). If the postponement of the request involved here, highly argumentative and postponed until a time when it would have been

emphasized out of proportion, does not in itself justify the trial judge's denial, it at least vested him with a broad discretion in the matter.

In any event, the trial judge was not required to give the instruction. It is clear, of course, that a defendant is entitled upon timely request to have an instruction embodying a theory of defense put before a jury in certain situations. Such instances may occur where the jury need be told that the defendant's evidence, if believed, would establish facts operating in law to destroy a crucial element of the Government's case<sup>59</sup> or raises a quasi-affirmative defense<sup>60</sup> or a special defense.<sup>61</sup> The same rule also applies to cases where *special facts* are involved which, upon timely request, should be embodied in an instruction to insure a balanced charge and to guarantee that the jury understands that belief of the defense-offered testimony must lead to acquittal. See, e.g., *Levine v. United States*, 104 U.S. App. D.C. 281, 261 F. 2d 747 (1958). Not every statement of defense requires such an instruction, however. See *Manning v. United States*, D.C. Cir. 20001, opinion filed October 28, 1966 (defendant's testimony in housebreaking case that he was in house mistakenly does not require instruction).<sup>62</sup>

For all of appellant Forte's testimony, it amounted simply to a denial of any attempt to influence Jean Smith and a denial of any association to do so. Onto that testimony was tacked his affirmative charges against Wallace and Mrs. Gross. He asked, in effect, that the judge argue (at a particularly one-sided point in time) and review his testimony. The trial judge had not argued the Government's case; he did not err in failing to argue Forte's. Read as a whole, as it is especially important to so read the charge in deciding this type of issue,<sup>63</sup> the instructions given presented to the jury a fair and balanced picture. And the jury was surely well aware of the relative

<sup>59</sup> See, e.g., *Tatum v. United States*, 88 U.S. App. D.C. 386, 391, 190 F. 2d 612, 617 (1951) (insanity).

<sup>60</sup> See, e.g., *Meadows v. United States*, 65 App. D.C. 275, 82 F. 2d 881 (1936) (self defense).

<sup>61</sup> See, e.g., *Lusty v. United States*, 198 F. 2d 760 (9th Cir. 1952) (entrapment).

<sup>62</sup> See also *Baker v. United States*, 310 F. 2d 924, 930 (9th Cir. 1962).

<sup>63</sup> See *Beck v. United States*, 305 F. 2d 595 (10th Cir. 1962).

positions of the parties and understood Forte's denial of the charges against him and the legal consequences of his testimony.<sup>64</sup> There was no abuse in refusing Forte's delayed oral request.

Finally, the instruction proposed, No. 36,<sup>65</sup> was improper, defective and unnecessary for the reasons set out in the margin.<sup>66</sup>

In the circumstances shown here, the trial judge did not abuse his discretion in rejecting appellant Forte's delayed request.<sup>67</sup>

**13. Detective Wallace was not an essential or material witness and the Court correctly refused to treat him as a missing Government witness**

(Tr. 886-87, 2051-52, 2057, 2163-79; J.A. , 448-49, 454, 474-89)

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<sup>64</sup> Compare *Levine v. United States*, *supra* in text (attorney on trial for falsely representing himself to be a police officer; testified he had represented self as "officer of the court") (compliance with Rule 30). Cf. *Manning v. United States*, *supra* in text.

<sup>65</sup> You are instructed that Forte has testified that his relationship with the witness Gross was instigated by Gross and the purpose of their meetings and telephone conversations was for Gross to supply Forte with information concerning one Samuel E. Wallace and that money was given by Forte to Gross for the purpose of covering Gross' expenses and to pay for the information concerning Wallace. If the jury believes the testimony of Forte or if the jury has any reasonable doubt concerning the matters about which Forte testified then the jury must return a verdict of not guilty as to Forte. In other words if the jury believe that Forte was not a party to any conspiracy and did not either directly or indirectly attempt to influence the witness Jean Smith as alleged in the indictment or if the jury has any reasonable doubt as to these matters then the jury must return a verdict of not guilty as to Forte. (J.A. 78.)

<sup>66</sup> The first sentence recited Forte's evidence, something the trial judge did not do with the Government's case. The second sentence was erroneous in that it would have told the jury that if they had "any reasonable doubt concerning the matters about which Forte testified" then they must acquit Forte—a clear and sweeping misapplication of the "reasonable doubt" doctrine. The third sentence was well covered by other portions of the instructions actually given (*e.g.*, Tr. 2305-06, 2321, 2323, 2329-2330).

<sup>67</sup> Even assuming error, it would not be so prejudicial as to render this trial unfair. Apparently Forte's attorney thought the instruction so non-essential that it appears to have been afterthought. It is highly unlikely that the jury would have been influenced by the lack of such an instruction.

As shown by the Counterstatement, Detective Samuel Wallace had nothing to do with the Government's case and was no part of it. Appellants, on the other hand, frequently sought to inject Wallace's name into the proceedings by cross-examination (*e.g.*, 99, 424) and by testimony of appellant Forte in which he claimed that Wallace was trying to extort him and he paid Mrs. Gross money to extricate himself from Wallace (*e.g.*, Tr. 1811-12).<sup>68</sup> Thus, having sought to catapult Detective Wallace's name into the case, appellants attempted to have the jury instructed that the absence of Wallace from the Government's case was to be unfavorably charged against the Government.<sup>69</sup> Appellants therefore requested this missing witness instruction:

You are instructed that the Government has failed to call as a witness one Samuel E. Wallace, a police officer of the District of Columbia, who played a major part in the investigation of this case. Since the said Wallace was peculiarly available to the Government you have a right to infer that the testimony of the said Wallace, if called, would have been unfavorable to the Government.<sup>70 71</sup>

<sup>68</sup> Appellants also assured the trial judge that it would be shown that Wallace went to Mrs. Gross' residence and suggested that Mrs. Gross testify falsely against appellant Laughlin (Tr. 425-29); that evidence was never shown. See Tr. 664-77.

<sup>69</sup> Appellants' logic for insisting that Wallace should have been produced as a Government witness depended, in the main, on the fact that on cross-examination:

... Mrs. Gross has testified that she knew Wallace; she knew Wallace during this period. Dr. Forte has testified as to the conversation which he had with Mrs. Gross on the occasions at the Chesapeake Club, and the reasons for the money being given to Mrs. Gross. Certainly the jury may wonder more fully about this Wallace situation, as to why he wasn't called. The Government could certainly have called him as a rebuttal witness, as well as Mrs. Gross.

(Attorney for defendant Forte, Tr. 2176-77; J.A. 487-88.)

<sup>70</sup> Defendants' requested Instruction No. 28 (J.A. 75.)

<sup>71</sup> Appellants' brief (p. 7) states that "Two prayers were tendered with respect to the failure of the Government to call Wallace . . ." Apparently, the reference is to their request (No. 28) and the Government's requested Instruction No. 4, which requested that the jury be charged that the Government was not required to call Wallace. The trial judge also denied that instruction, considering it the counterpart of appellants' instruction (Tr. 2057; J.A. 454).

The Government's position was that Wallace was no part of the case (Tr. 2176; J.A. 486). After hearing counsel (Tr. 2051-52, 2163-77; J.A. 474-89), the trial judge denied this instruction and prohibited argument to the effect that the Government should have produced Wallace (Tr. 2177-78). He summarized appellants' position<sup>72</sup> and noted that the missing witness rule related to a witness who

should be brought in to elucidate the transaction. And the transaction here is whether or not James J. Laughlin and Allan U. Forte obstructed justice, conspired to obstruct justice. The only thing is that you would have Mr. Wallace come in and testify that he didn't make any approaches to Mr. Forte. (Tr. 2177-78; J.A. 488.)

The trial judge refused to consider Wallace a missing witness in the sense of the rule. That conclusion was clearly correct for several reasons and was well within the recognized discretion of the trial judge, who was best able to assess the materiality, availability, and necessity of Wallace to this lengthy case.

"The missing witness instruction is one within the sound judicial discretion of the trial judge who must decide whether in all the circumstances it is reasonable for the jury to be permitted to draw an adverse inference from one party's failure to call a witness peculiarly available to him." *Morrison v. United States* U.S. App. D.C. , 365 F. 2d 521 (1966). The traditional missing witness rule itself is "that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable",<sup>73</sup> the corollary being that no such presumption arises if the witness is equally available to

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<sup>72</sup> THE COURT: As I understand the argument made by Mr. Laughlin, and now supported by you [counsel for Forte], it is that since Mr. Forte brought in the name of Wallace, therefore the Government should go out and attempt to show that Wallace didn't talk to Forte about money, and that you and Mr. Laughlin both agree that if Wallace would come in he would deny he made any approaches to Mr. Forte about money. Is that the essence of it?

MR. GABER: In view of this testimony before Judge Tamm [in the trial of No. 741-61], yes. (Tr. 2177.)

<sup>73</sup> *Graves v. United States*, 150 U.S. 118, 121 (1893); *Milton v. United States*, 71 App. D.C. 394, 397, 110 F. 2d 556, 559 (1940).

both parties and is a stranger, in a legal sense, to the party sought to be charged.<sup>74</sup> Nor is the missing witness instruction appropriate where the testimony would be immaterial<sup>75</sup> or unnecessary.<sup>76</sup>

Wallace was not, as appellants urge, "essential" to the charges on trial. There was no evidence that Detective Wallace could elucidate the transaction on trial, i.e., whether appellants endeavored to influence Jean Smith and conspired to do so. At best, Detective Wallace could have denied guilt of Forte's charges against him, but those charges were not on trial. Wallace's testimony was not shown to be material or necessary to the inquiry into appellants' guilt. See (*James*) *Richards v. United States*, 107 U.S. App. D.C. 197, 275 F. 2d 655, cert. denied, 363 U.S. 815 (1960).<sup>77</sup> Even putting aside the question of equal availability, the requested instruction and comment would have been improper.

The trial judge did not abuse his discretion; rather, he acted well within that discretion.<sup>78</sup>

<sup>74</sup> See *Pennycell v. United States*, 122 U.S. App. D.C. 332, 353 F. 2d 870 (1965); *Milton v. United States*, 71 App. D.C. 394, 110 F. 2d 556 (1940); *Egan v. United States*, 52 App. D.C. 384, 287 Fed. 958 (1923).

<sup>75</sup> See *Milton v. United States*, 71 App. D.C. 394, 110 F. 2d 556 (1940). See also *Morton v. United States*, 79 U.S. App. D.C. 329, 332 and n. 11, 147 F. 2d 28, 31 and n. 11, cert. denied, 324 U.S. 875 (1945).

<sup>76</sup> See (*James*) *Richards v. United States*, 107 U.S. App. D.C. 197, 275 F. 2d 655, cert. denied, 363 U.S. 815 (1960); *United States v. Antonelli Fireworks Co.*, 155 F. 2d 631 (2d Cir.), cert. denied, 329 U.S. 742 (1946); *DeGregorio v. United States*, 7 F. 2d 295 (2d Cir. 1925).

<sup>77</sup> The Government had only the burden of establishing beyond a reasonable doubt every element of the offense charged; it was not necessary to go further and rebut defense testimony which it thought it need not refute.

107 U.S. App. D.C. at 200, 275 F. 2d at 658.

<sup>78</sup> Even had the trial judge erred in this regard, appellants would be unable to show prejudice since even had comment been made to the jury, it is not credible that the jury would have been beguiled into believing that it should be inferred that Detective Wallace would have come into court and testified that he had extorted Forte. (Defendants recognized that Detective Wallace would not do so. (Tr. 2175; J.A. 486.)) Cf. *Pennycell v. United States*, 122 U.S. App. D.C. 332 353 F. 2d 870 (1965). See also (*James*) *Richards v. United States*, 107 U.S. App. D.C. 197, 199, 275 F. 2d 655, 657, cert. denied, 363 U.S. 815 (1960) (not to be inferred that missing witness would have incriminated self). The incongruity of asking the judge to tell the jury they could infer what appellants knew to be incorrect, might also be pointed out.

14. As to appellant Forte only—The trial judge did not abuse his discretion in allowing impeachment of appellant Forte by a prior conviction, which discretion he exercised after an exceptionally lengthy *Luck* hearing during which he excluded evidence of other records. Nor did the trial judge err in refusing Forte's untimely request for a change in an instruction after he had assured the trial judge that the instruction to be given was correct

(Tr. 1763-69, 1770 *et seq.*, 2020-31, 2037-38, 2178-81, 2312-13, 2342-43; J.A. 392-98, , 433-41, 489-92, 89)

On cross-examination the prosecutor was permitted to impeach appellant Forte with evidence of one prior 1942 North Carolina abortion conviction for which he had been pardoned. The trial court is said to have abused its discretion in permitting this impeachment under *Luck v. United States*, 121 U.S. App. D.C. 151, 348 F. 2d 763 (1965) (interpreting this jurisdiction's impeachment-by-prior-conviction statute). Thus appellant Forte does not advance the contention that the mere fact that his North Carolina conviction was pardoned automatically precluded use of the evidence. Nor could he. The authorities are in singular accord that a pardon unrelated to guilt does not render a prior conviction inadmissible for purposes of impeaching a witness.<sup>79</sup> This court has adopted that rule. (*Robert*) *Richards v. United States*, 89 U.S. App. D.C. 354, 192 F. 2d 602 (1951), *cert. denied*, 342 U.S. 946 (1952). At the same time, the Court left open the case where the pardon had been accorded on the express basis of innocence. In this case, the pardon, read into the record by the Government, did not state or in any way indicate that it was granted on the basis

<sup>79</sup> In addition to the numerous authorities recited in (*Robert*) *Richards v. United States*, 89 U.S. App. D.C. 354, 192 F. 2d 602 (1951), *cert. denied*, 342 U.S. 946 (1952), see, e.g., *United States v. Denton*, 307 F. 2d 336 (6th Cir.), *cert. denied*, 371 U.S. 923 (1962); *State v. Tansimore*, 3 N.J. 516, 71 A. 2d 169 (1950); *Statham v. Blaine*, 234 Miss. 649, 107 So. 2d 93 (1958); *Rush v. State*, 253 Ala. 537, 45 So. 2d 761 (1950); *Bernard's Inc. v. Austin*, 300 SW 2d 256 (Tex. Crim. App. 1927); *State v. Serfling*, 131 Wash. 605, 230 Pac. 847 (1924); *Angela v. Virginia*, 10 Grat. 696 (Va. 1853); 3 WIGMORE, EVIDENCE § 980, at p. 543 (3d ed. 1940); MCCORMICK, EVIDENCE 91 (1954); UNDERHILL, EVIDENCE § 244 (5th ed. 1956); 98 C.J.S., *Witnesses* § 508; 58 AM. JUR., *Witnesses* § 743. See also *Petition of de Angelis*, 139 F. Supp. 779 (E.D.N.Y. 1956).

of innocence.<sup>80</sup> While the language may perhaps be overly broad, as long ago as 1867 the Supreme Court of North Carolina, in distinguishing between types of clemency said, "A pardon is granted to one who is certainly guilty . . . ." *State v. Blalock*, 61 N.C. 242 (1867).<sup>81</sup> At the least, "A pardon is not presumed to be granted on the ground of innocence . . . ." *Curtis v. Cochran*, 60 N.H. 242 (1870). And the case which this Court left open in *Richards* is one where the pardon was on the express ground that innocence had been established. 89 U.S. App. D.C. at 357, 192 F. 2d at 606. Moreover, if anyone would have the burden of showing that innocence was the basis of the pardon, it would be the defendant, who is in peculiar control of the relevant facts. Here appellant Forte did not even make an unsupported assertion of innocence in explaining the North Carolina offense—even though the trial judge gave him express opportunity to do so in testifying (Tr. 2029; J.A. 440). See Tr. 2039-41; J.A. 443-45. Thus the conviction was permissible matter for impeachment within the trial judge's discretion.

<sup>80</sup> (Tr. 2022-23; J.A. 435-36) :

To all who shall see these presents, Greetings.

Whereas, A. U. Forte, Colored, at the March Term, 1942, of the Superior Court of Forsyth County, was convicted of abortion and by judgment of said court was sentenced to 12 months on the roads, suspended on certain conditions, including payment of fine and costs, not practice chiropractic in Forsyth and contiguous counties, be of good behavior, and not violate the State laws for four years, and

Whereas it has been made to appear to me that the case is one fit for the exercise of executive clemency,

Now, therefore, I, R. Gregg Cherry, Governor of the State of North Carolina, in consideration of the premises and by virtue of the power and authority vested in me by the constitution of the State, do by these presents pardon the said A. U. Forte, upon the condition that his pardon shall not extend to any other offense whereof the said party may have been guilty.

In witness whereof I have hereunto set my hand and seal.

[Dated 1948]

<sup>81</sup> In North Carolina, pardons are authorized under N.C. CONST. art. III, § 6 (4A GEN. STAT. N.C. (1955)). The procedure regarding pardons is set out in statutes. See 3C GEN. STAT. N.C. §§ 147-21, 22, 23, 24 (1964 replacement vol., tracing amendments). However, neither the constitutional provision nor the statute shows any particular effect to be assigned to a pardon.

Appellee has unearthed no North Carolina cases dealing with the effect of a pardon on impeachment.

Appellee, of course, acknowledges that the pardon and the circumstances surrounding it were relevant factors for consideration in the exercise of the trial judge's discretion. Cf. *Brown v. United States*, D.C. Cir. No. 20041, decided November 10, 1966, slip op. 8 n. 10. Here the trial judge fully considered the pardon; he permitted this impeachment only after a valid, careful and fully informed exercise of his discretion as envisaged in *Luck* (even though this case was tried only one month after the *Luck* decision). The record amply supports that conclusion.

Before beginning his defense, counsel for appellant Forte approached the bench and raised the question of impeachment by Forte's criminal record in Baltimore. He stated that appellant was going to testify and asked the trial judge to rule on the Maryland record for impeachment purposes. (Tr 1763-64; J.A. 391).<sup>22</sup> The Government advised the court and counsel that Forte also had a 1942 conviction in North Carolina, further informing the court of the 1948 executive pardon (Tr. 1965; J.A. 393). The Maryland record showed 5 or so indictments for abortion in 1954 and 1955. In each instance there apparently was a determination of guilt, but under a peculiar Maryland practice (see Tr. 1770, 1767-68) the sentences and verdicts were struck and the defendant put on "probation before verdict" (see Tr. 1902-31, 2003, 2004 *et seq.*). The trial judge considered the *Richards* case, *supra*, and other pertinent cases. Counsel for Forte pressed the age of the North Carolina conviction and the pardon (*e.g.*, Tr. 2030).

Finally, with *Luck* expressly in mind (Tr. 2020; J.A. 443), the trial judge made the following rulings limiting impeachment: he refused to permit the Government to impeach by way of any of the numerous 1954-55 Maryland offenses (Tr. 2020; J.A. 443); he allowed the Government to impeach by use of the North Carolina conviction (*ibid.*); appellant

<sup>22</sup> Argument on the issue was partially heard, then Forte testified on direct examination (see Tr. 1768, *et seq.*) Cross-examination commenced but did not reach the impeachment stage (Tr. 1922-33, 1837-56). Argument then apparently resumed on the 17th day of trial and carried into the 18th day, whereupon the trial judge made his final rulings (Tr. 2020-31) and impeachment by the North Carolina conviction was allowed (Tr. 2031, 2037-38).

was allowed to bring out that a pardon was issued (*ibid.*); appellant was allowed to explain the circumstances of his conviction (Tr. 2029; J.A. 439-40); and appellant was told he could protest his innocence of the North Carolina offense (*ibid.*). Appellant Forte was subsequently impeached with the North Carolina conviction but in the same answer of acknowledgement he noted his pardon (Tr. 2037). On redirect examination he explained the circumstances of the conviction (Tr. 2030-40) (again a protestation of innocence was conspicuously missing) and he again stated he had been pardoned (Tr. 2041; J.A. 444-45).

In sum, one conviction was admitted; a sizable number of convictions were excluded. The *Luck* hearing held by the trial judge took part of the 16th day of trial, apparently all of the 17th day (half session), and part of the 18th day. This was no perfunctory exercise of discretion under *Luck*. The experienced and able trial judge, who had presided over the trial for 18 trial days before he ruled finally, had the best possible grasp of the trial atmosphere, the sophistication and evidentiary needs of the jurors, the demeanor of the witnesses, and the tenor of this extensive trial. It was for these reasons that this Court determined in *Luck* that matters such as this must be placed within the realm of the trial judge's sound discretion. *Luck v. United States*, *supra*, at 156, 157, 348 F. 2d at 768, 769; *Hood & Jackson v. United States*, U.S. App. D.C., 365 F. 2d 949, 951 (1966).<sup>83</sup> Here, in exercising his discretion the trial judge determined that credibility in the case before him was crucial. (Tr. 2020-21; J.A. 443-44.) Appellant Forte was not deterred from taking the stand; his story was put before the jury. There was no abuse of discretion.<sup>84</sup>

<sup>83</sup> The alert and experienced trial judge presiding over a criminal case has a grasp of how the interests of justice are best served in the case taking shape before him.

*Hood & Jackson v. United States*, *supra* in text, 365 F. 2d at 951.

<sup>84</sup> Appellant's brief attempts to fault the trial judge particularly because of the pardon and the age of the conviction (1942). As to the pardon, the trial judge had before him a pardon which did not profess to be based on innocence; nor did Forte assert innocence. It was hardly an abuse of discretion to consider the pardon in light of these factors. As to the age of the conviction, that is a factor, and only one, for the trial judge to consider; it is not an absolute. In any event, it might be said that the 1942 conviction

Error is also alleged in the denial (see Tr. 2342-43; J.A. 116-17) of appellant Forte's requested instruction labeled No. 35.<sup>85</sup> Whether such an instruction is something required upon timely request or whether the matter is strictly one for argument need not be decided here. This belated instruction was orally tendered under circumstances identical to that discussed in Argument 12 (*supra* pp. 39-41). There was no compliance with Fed. R. CRIM. P. 30 and the request came after the charge was completed, ignoring numerous occasions to submit it if appellant thought it important (see *supra*, pp. 39-41).<sup>86</sup> But there are also additional factors here.

In discussing proposed instructions, the court previewed the charge on Forte's prior conviction (Tr. 2063-64). (It was this charge that was later given.) Not only did Forte's counsel fail to object when it was previewed, but he affirmatively told the judge there was nothing wrong with the instruction. Wishing to preserve his point that the North Carolina conviction should not have been introduced, counsel for Forte expressly stated that he had no objection to the form of the instruction and that it was proper if the conviction itself was properly introduced.<sup>87</sup> By his actions counsel waived any right to subsequently claim that the instruction was deficient, as he attempts to do here. The second additional factor is that al-

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was, in effect, "up-dated" by the 1954-55 convictions (later struck in favor of "probation before sentence") for the same crime as the 1942 conviction. Thus there was no basis for the judge to believe that the 1942 conviction was an isolated instance (although appellant may have gotten the gratuitous advantage of that supposition on the part of the jury, thus lessening the practical impact on the jury).

<sup>85</sup> In connection with Forte's criminal record you are further instructed that in evaluating such criminal record as affecting Forte's credibility you may also consider the explanation given by Forte on the witness stand attenuating such conviction, including the testimony that Forte had received a pardon from the Governor of the State where the conviction was had. (J.A. 78.)

<sup>86</sup> At one point appellant Laughlin inquired of the trial judge if he planned to give an instruction concerning Forte's explanation of the North Carolina conviction. The judge noted that he was not, that he was leaving the matter for argument (Tr. 2180; J.A. 491). Even then counsel for Forte made no request or objection.

<sup>87</sup> Mr. GABER: No [I do not want to hear instruction again]. There is nothing wrong with the form of the instruction. I don't object to that. I object to the instruction being given at all, and I base that objection on—

though the trial judge made it clear that counsel for Forte could argue Forte's explanation of his conviction to the jury (Tr. 2180; J.A. 491), in refusing the late-tendered instruction the trial judge noted that counsel had not done so, failing to even argue the facts contained in the proposed instruction (Tr. 2342-43; J.A. 117). Obviously, counsel did not think the point a crucial matter for the jury's consideration.

Under the circumstances, the trial judge did not abuse his discretion in allowing the limited impeachment permitted, nor did he err in his instructions on the matter.<sup>88</sup>

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The COURT: You objected to the evidence being received.

Mr. GARBER: Yes.

The COURT: Once in, it's a proper charge; isn't that right?

Mr. GARBER: Yes. But in order to preserve the record, I feel I must make my objection.

The COURT: I think you have well preserved the record, so far as the admissibility of the prior conviction. I think that's what your complaint is.

Mr. GARBER: Yes. And therefore, to follow it up, I would object to the instruction being given.

The COURT: All right. (Tr. 2179-80; J.A. 490-91.)

"The brief filed by appellants (p. 50) phrases the argument in regard to this point in the plural "we". To that extent, the wording suggests that appellant Laughlin also presses the point. The point, however, is clearly limited to appellant Forte.

Although appellant Laughlin went on record as objecting to Forte's impeachment (Tr. 2031), he acknowledged during an abortive attempt to "cross-examine" appellant Forte that "he said [testified to] nothing pertinent to me, no." (Tr. 1821-22; J.A. 410.) Thus any attack on appellant Forte's credibility would not bear on appellant Laughlin. Secondly, even if appellant Laughlin did have an interest in the issue of impeachment of Forte, he waived any right to complain. At one point he asked the trial judge if he planned to give a cautionary instruction concerning him insofar as the impeachment matter (Tr. 2103; J.A. 466). The trial judge gave appellant Laughlin several opportunities to request such an instruction (Tr. 2103-04, 2163, 2178; J.A. 466, 474-75, 489-90) but appellant Laughlin finally and expressly decided to forego any such instruction (Tr. 2179; J.A. 490).

**15. The trial judge did not abuse his discretion in limiting certain cross-examination of Mrs. Gross during her rebuttal testimony**

(Tr. 248; J.A. 171; Tr. 679, 2143-44, 2150-51)

Appellants complain that the trial judge erred in not allowing appellant Laughlin to elicit one answer from Mrs. Gross. Not only do appellants fail to show any resultant prejudice requiring reversal of their convictions, but the trial court's ruling was entirely proper.

On direct examination during the Government's case-in-chief, Mrs. Gross testified that when she and appellant Laughlin first met they discussed Mrs. Gross' dismissal from the Baltimore police force. She further testified that she "also told him about a certain party in Baltimore who could get me back on the Baltimore City Police Force for \$500." (Tr. 248; J.A. 171.)<sup>89</sup> On cross-examination by appellant Laughlin during the case-in-chief Mrs. Gross reiterated the conversation (Tr. 769). At that point, there was no interest expressed by appellants concerning who had made the approach to her. After Mrs. Gross testified on rebuttal, and during their cross-examination, as to rebuttal, appellants harked back to this testimony. Counsel for Forte again asked about the statement in a general way (Tr. 2143). Finally, appellant Laughlin, also during cross-examination of Mrs. Gross during rebuttal testimony, asked Mrs. Gross the name of the person who made the \$500 offer in Baltimore (Tr. 2150). Mrs. Gross did not want to divulge the name and the court sustained the Government's objection (Tr. 2151). At trial appellants' only stated reason for wanting this information was essentially this: "Your Honor, I think if it was an honest answer, if she is not concealing anything, she should be required to answer it. . . ." <sup>90</sup>

<sup>89</sup> Mrs. Gross' dismissal from the Baltimore police force did not relate to this case (see Tr. 396, 423).

<sup>90</sup> (Appellant Laughlin, Tr. 2151). Appellants' even now show no importance in this name. Nor did they show any interest in the name when they were cross-examining Mrs. Gross about the matter at prior points in the trial (see Tr. 769, 2143). Appellants' vague and speculative statement is only they "were entitled to this information in that it might have had an important bearing on future cross-examination." (Brief for Appellants, p. 51)

The extent of cross-examination is a matter traditionally placed within the sound discretion of the trial judge. *E.g.*, *Glasser v. United States*, 315 U.S. 60, 83 (1942). The record attests to the fact that throughout the proceedings, the trial judge allowed appellants an abundant amount of leeway for their extensive cross-examinations of Mrs. Gross; he did not abuse his discretion in this instance.

16. Appellants' argument that there was error in the "Denial of Cautionary Instructions" is totally without merit

(Tr. 2321, 2323-24; J.A. 97-100)

Appellants' sixteenth argument (Brief for Appellant, p. 52) is merely a variation on the theme of their prior argument that there was no evidence of a conspiracy (see Brief for Appellants, pp. 45-46, and appellee's response to that argument Argument 11, *supra*, note 58). The contention apparently is that all of Mrs. Gross' live, courtroom testimony was inadmissible because it should have been considered a "post-conspiracy declarations of a co-conspirator." As noted *supra*, n. 58, that argument misapprehends the meaning of the post-conspiracy declarations rule; it confuses Mrs. Gross' live, judicial, courtroom testimony with the out-of-court, extrajudicial "declarations" with which the cases are concerned.<sup>21</sup> The reason for the rule that post-conspiracy statements are admissible against

<sup>21</sup> *Taylor v. United States*, 104 U.S. App. D.C. 219, 260 F. 2d 737 (1958), misrelayed upon by appellants is illustrative. The quotation from the *Taylor* case set out in appellants' brief (p. 52) is really a quotation from *Glasser v. United States*, 315 U.S. 60, 74 (1942), and the Court in *Taylor* made quite clear the type of declarations referred to by the "such declarations" language in the *Glasser* quotation. In *Taylor*, a police officer testified in court to an *extrajudicial* statement by one of the defendant's co-conspirators and there was insufficient evidence otherwise to show that a conspiracy existed. Moreover, the opinion also expressly states what type of "declarations" were involved:

The contention is that a defendant's connection with a conspiracy may not be established by the *extra-judicial statement* of an alleged co-conspirator made out of the presence of the defendant. [Emphasis supplied.]

104 U.S. App. D.C. at 220, 260 F. 2d at 738.

the declarant only<sup>92</sup> is that the agency existing among the co-conspirators ends with the conspiracy. Since each co-conspirator is thereafter without authority to speak for the others, he or she is likewise powerless to make any statements admissible against the others under an exception to the hearsay rule. *Lutwak v. United States*, 344 U.S. 604 (1953). It is obvious that the rule is not a bar to the reception of live, courtroom testimony against the other conspirators by a witness who was a co-conspirator. Such judicial testimony is not hearsay and its admission does not depend upon any theory of agency or exception to the hearsay rule.

Appellants do not specify which of the many tendered instructions they refer to in urging that "it was error to deny the cautionary instructions tendered." (Brief for Appellants, p. 52.) But since the contention is made "in view of" (*ibid.*) their erroneous understanding of the law, *supra*, their argument can have no merit. In fact, the trial judge carefully and correctly instructed the jury with respect to extrajudicial statements of co-conspirators (see Tr. 2321, 2323-24; J.A. 97-100).

Appellants have no valid complaints in this regard.

17. Appellants were furnished with numerous grand jury transcripts; they made no request for any additional transcripts; nor did they make in the trial court or even in this Court an allegation of particularized need

(Tr. 134, 133-34, 388-93; J.A. 143-45, 245, 259-64)

Appellants' final contention is that they should have been given the "entire Grand Jury minutes". They point to no juncture in the record where they made a request in the court below for additional grand jury minutes and the record shows none.<sup>93</sup> Under FED. R. CRIM. P. 6(e) a defendant bears the

<sup>92</sup> *E.g., Delli Paoli v. United States*, 352 U.S. 232, 237 (1957); *Krulwitch v. United States*, 336 U.S. 440 (1949).

<sup>93</sup> During the trial here appealed from, appellant Laughlin (who was counsel for both himself and Forte at the prior trial) stated that he had liberal access to the grand jury minutes on appeal to this Court (Tr. 134). After this Court's remand, the record shows no motion for further grand jury minutes, even though appellants had occasions to make such motions if there was a legitimate desire in that regard (*e.g.*, Tr. 333-34, 392-93; J.A. 245, 263).

burden of instigating the production of, and proving the need for, this unusual disclosure. *Dennis v. United States*, 384 U.S. 855, 870-74 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959). No such showing was made for the unspecified minutes now sought. In fact, appellants make no such showing even at this belated stage of the proceedings.

Nor do appellants specify what further grand jury minutes should have been given to them.<sup>44</sup> In fact, the grand jury minutes of the witnesses in this case, plus many others, were available to appellants and were turned over to them. The trial transcript reveals that at least the following transcripts were in appellants' possession (some concerning witnesses pertaining to other cases involving appellants):

Bernice Gross (4 appearances); Jean Smith; appellant Laughlin; appellant Forte; Officer Starzak, Morrority, Burrell; Detective Wallace; Capt. Preston; Robert Hill; Sgt. Diven; Theodore Hagens; Leroy Johnson; also the transcript of the interrogation of Mrs. Gross on March 1, 1963. (Tr. 388-93; J.A. 388-63.)

Appellants acknowledged receipt of these transcripts (Tr. 392-93; J.A. 263-64). At another point, appellant Laughlin stated: "We have the various grand jury testimony" and acknowledged they had it for some time (Tr. 333-34; J.A. 245). At still another point in the trial, appellant Laughlin noted that pertinent grand jury transcripts were a matter of record in other cases. Additionally, he stated that "they were made available in complete form when the Government noted an appeal from Judge Curran's ruling dismissing the indictment of 599-63" and that "they were made available very completely and minutely in the United States Court of Appeals in my own case . . . ." (Tr. 134; J.A. 143.)

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<sup>44</sup> When a request for disclosure of grand jury testimony is honored upon a showing of particularized need, the disclosure should be made in a limited manner. *Dennis v. United States*, 384 U.S. 855, 869 (1966); *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958). Appellants unspecified appellate complaint is thus without meaning.

Even where a request for grand jury testimony is honored, the disclosure is to be done in a limited and discrete manner. *Dennis v. United States*, *supra*, at 869; *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958). The sweeping production here was more than ample for any legitimate purpose.

Appellants' grand jury minutes argument is groundless.

### CONCLUSION

Many of the appellants' arguments are not supported in fact. Appellee submits that all are unfounded in law and that none can successfully divert attention from the fact that appellants were accorded a full and fair trial, during which they were given exceptionally wide latitude in defending against the charges. Appellants' guilt was proved by abundant, competent evidence. Their assignments of error are without merit.

Wherefore, appellee submits that the judgment of the District Court should be affirmed.

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## APPENDIX

### Opinions of District Judge Curran Pertinent to Argument 3, *supra*

*United States v. James J. Laughlin*, 223 F. Supp. 623 (D.C.C. 1963) Crim. Nos. 599-63, 600-63; November 13, 1965.

CURRAN, District Judge.

The defendant in the above entitled cause was indicted by a Grand Jury for perjury (18 U.S.C. § 1621) on July 3, 1963. The case went to trial October 1, 1963 and on October 8, 1963 a mistrial was declared R.C., 222 F. Supp. 264, the jury discharged and the case was passed for trial. On October 30, 1963 the defendant filed motions to dismiss the indictments in Criminal Case Number 599-63 and Criminal Case Number 600-63, which were heard on November 1, 1963.

\* \* \* \* \*

[Discussion of validity of tape recordings]

\* \* \* \* \*

47 U.S.C. § 605 "contemplates voluntary consent and not enforced agreement to publication." See *Weiss v. United States*, 308 U.S. 321, 330, 60 S.Ct. 269, 84 L.Ed. 298 (1939).

After Judge Youngdahl read the transcript of the exchange between Mr. Sullivan, Mrs. Gross and the Deputy Foreman of the Grand Jury, and had questioned Mrs. Gross as to the circumstances under which she made the telephone calls, he concluded that the *Weiss* case was dispositive of the issue in the present case and required the exclusion of the tapes on the ground that Mrs. Gross' consent was not voluntary. I agree.

Perjury cannot be proved by the uncorroborated testimony of one witness, since the falsity of one person's oath cannot be established by another person's oath alone. In other words, in a prejury prosecution the uncorroborated oath of one witness is not enough to establish, for purposes of conviction of perjury, the falsity of sworn testimony.

Before the Grand Jury the Assistant United States Attorney in charge of the presentation of the case made the statement that without Mrs. Gross' testimony "the whole thing falls apart," and then made the further statement "we need Mrs. Gross; without her we have got nothing, without her we have got nothing." Even if the Government were able to show by records of the Chesapeake and Potomac Telephone Company that there were phone calls between Mr. Laughlin's office and the United States Attorney's Office, this would be of no consequence for it would have no legal efficacy under the circumstances of this case, as it would be impossible to show who was carrying on the conversations. It follows, therefore, that the motion of the defendant Laughlin to dismiss in Criminal Case Number 599-63 must be and the same is hereby granted.

One further matter deserves comment. The Government's position is that the use of an induction coil is not an interception within the meaning of 47 U.S.C. § 605.

\* \* \* \* \*

[Interpretation of statute.]

\* \* \* \* \*

In Criminal Case Number 600-63, which is the conspiracy charge against Forte and Laughlin, the motion to dismiss is denied. The motions to impound the tape recordings are also denied. The motion for discovery has been temporarily withdrawn.

*United States v. James J. Laughlin*, 226 F. Supp. 112 (D.D.C. 1964) Crim. No. 599-63; January 22, 1964

CURRAN, District Judge.

In an opinion filed by the Court on November 13, 1963, D.C.D.C. 223 F. Supp. 623, the Court dismissed the perjury indictment then pending against the defendant James J. Laughlin.

On November 18, 1963 the Government filed a motion for the Court to reconsider and vacate the Court's order dismissing the indictment.

The Government bases its motion on two propositions. First, that even excluding the taped telephone calls, "there was ample evidence from the witness Gross, corroborated by documents, that the witness Bernice Gross had talked on the telephone with the defendant Laughlin many times before his voluntary appearance before the grand jury on March 6, 1963." And second, "that in the Court's opinion dismissing the indictment in this case the Court has applied the quantum of evidence rule of prejury cases which is applicable only at the trial level."

In support of its first proposition, the Government attached to its motion photostatic copies of the telephone company records of the telephone calls and the bills for the same.

These records prove only one thing, if they prove anything at all, and that is, telephone calls were made between certain phone numbers. To argue from a phone company record showing a call between certain phone numbers that the persons in whose names those phones are listed made the call is destructive of a very important rule of evidence; namely, that the person making the entry (in this case the telephone operator) should be making the entry based on personal knowledge. This principle has often been invoked in excluding entries made by a person who had no personal knowledge of the supposed facts recorded. (It hardly need be pointed out that this same rule applies with equal force to a person-to-person call, as there the operator has no personal knowledge of the real parties making the call, but only records the names given to her.)

With regard to the telephone company bills it should be noted that because the person in whose name the telephone is listed pays the bills for calls billed to his listing, it is no proof whatsoever that certain of those calls were made by him personally, as any of several people may have permission to use his telephone and this is especially true in the case of a business phone.

Certainly none of this so called corroboration satisfies the requirement that there must be direct and positive evidence of falsity of defendant's sworn statement, relied on by the prosecution. *Smith v. United States*, C.C.A. Ohio 1948, 169 F. 2d 118; *Clayton v. United States*, C.C.A. West Virginia 1922, 284 F. 537. And circumstantial evidence thereof is insufficient, no matter how persuasive. *United States v. Harris*, D.C.N.J. 1940, 36 F. Supp. 877 reversed on other grounds 311 U.S. 292, 61 S. Ct. 217, 85 L. Ed. 196. The rule that oral testimony of one witness is sufficient unless corroborated to sustain a conviction for perjury presents an exception to the general rule that evidence which is sufficient to convince a jury of defendant's guilt beyond a reasonable doubt is sufficient to sustain a conviction. *United States v. Palese*, C.C.A. Del. 1943, 133 F. 2d 600. All this is to say that to be sufficient to sustain a conviction for perjury, there must be clear and direct testimony of more than one witness, or testimony of one witness and convincing corroborative circumstances.

With respect to the Government's second proposition, the Court agrees that the quantum of evidence necessary to sustain a conviction and an indictment are not the same. However, the Court does not draw what is considers to be the extreme interpretation of the *Costello* ruling that the Government does. *Costello v. United States*, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397. Certainly an indictment based on incompetent evidence, even though returned by a legally constituted and unbiased grand jury, should not be allowed to stand. If this were not so, the only reason the trial court could order the disclosure of grand jury proceedings would be where a proper case had been made alleging bias. However, that the trial court may request the grand jury proceedings be disclosed

where an adequate showing that the evidence before the grand jury was invalid is a proposition that needs no citation.

It is also true that an indictment will not be dismissed if there is some incompetent evidence before the grand jury, as long as there is sufficient competent evidence to sustain it. However, there may be competent evidence and illicit evidence before the grand jury and the two may be so intertwined that the Court is unable to say (even if it considered the competent evidence sufficient) that the grand jury did not in fact return the indictment primarily influenced by the illicit evidence. That, the Court considers to be the case here. Evidence was presented to the grand jury in this case which was in disregard of the accused's rights, and was obtained even in the face of 47 U.S.C. § 605.

\* \* \* \* \*

[Interpretation of statute.]

\* \* \* \* \*

Accordingly, the motion to vacate the Court's order of November 13, 1963 be and the same is hereby denied.

#### STATUTES AND RULES INVOLVED

Title 18, Section 371 of the United States Code, provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years or both.

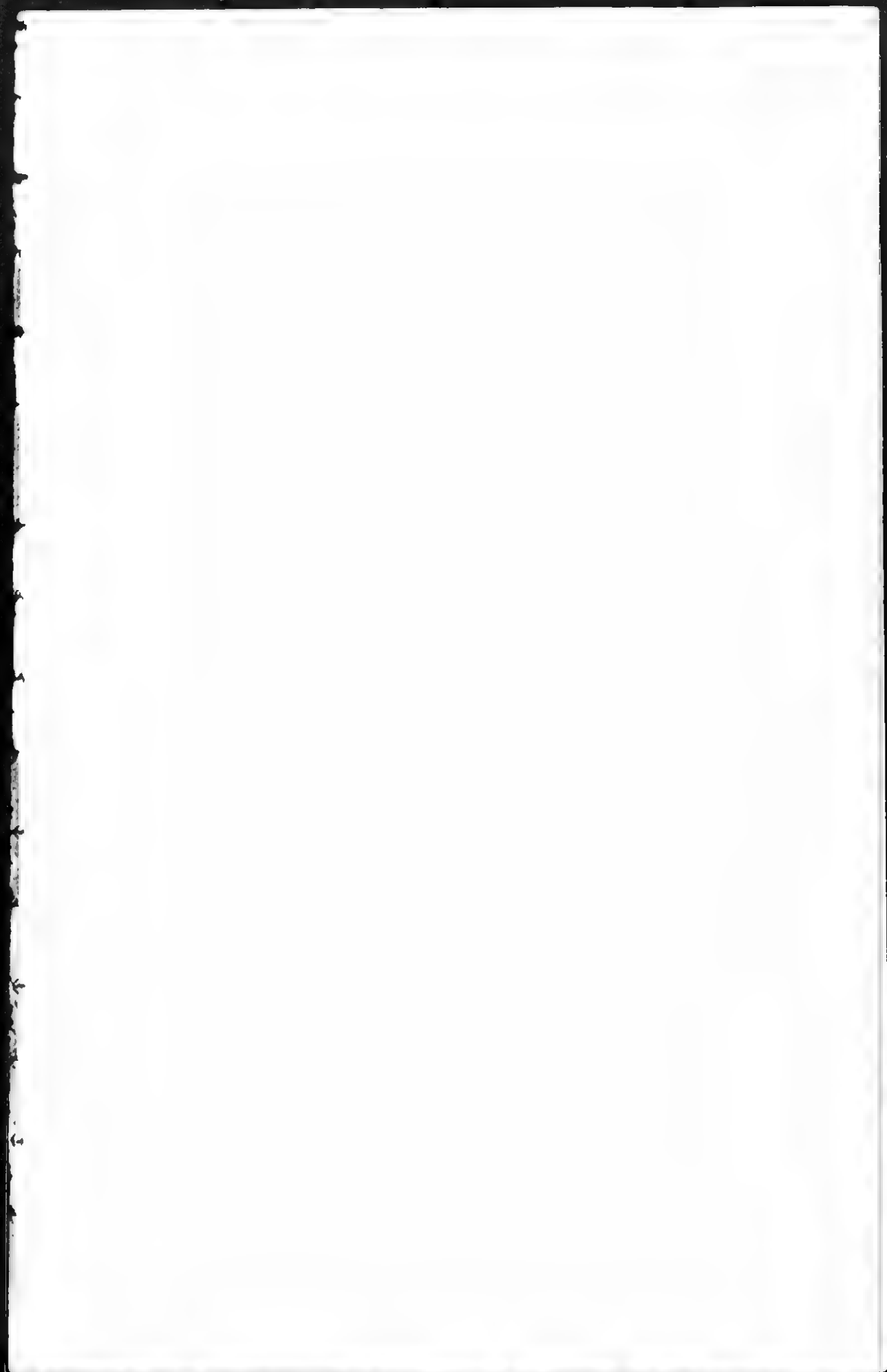
Title 18, Section 1503 of the United States Code, provides:

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand

or petit juror or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned no more than five years, or both.

Rule 30, Federal Rules of Criminal Procedure, provides:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.



UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES J. LAUGHLIN  
ALLAN U. FORTE,

Appellants

v.

UNITED STATES OF AMERICA,  
Appellee

Nos. 19562 and 19563

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REPLY BRIEF ON BEHALF OF APPELLANTS

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Appeal from the United States District Court  
For the District of Columbia

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James J. Laughlin  
Appellant in proper person

William J. Garber  
Counsel for Appellant Forte

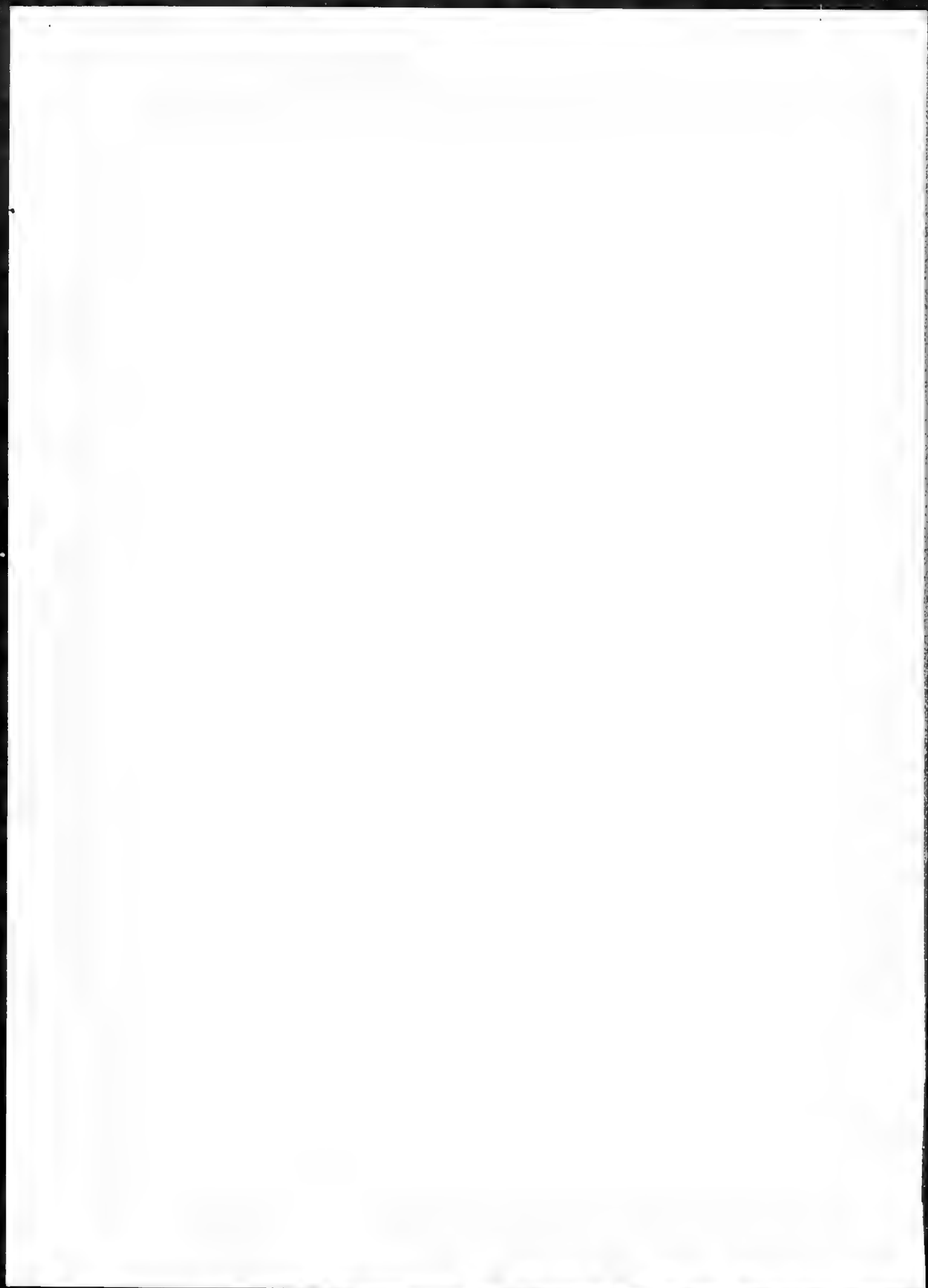


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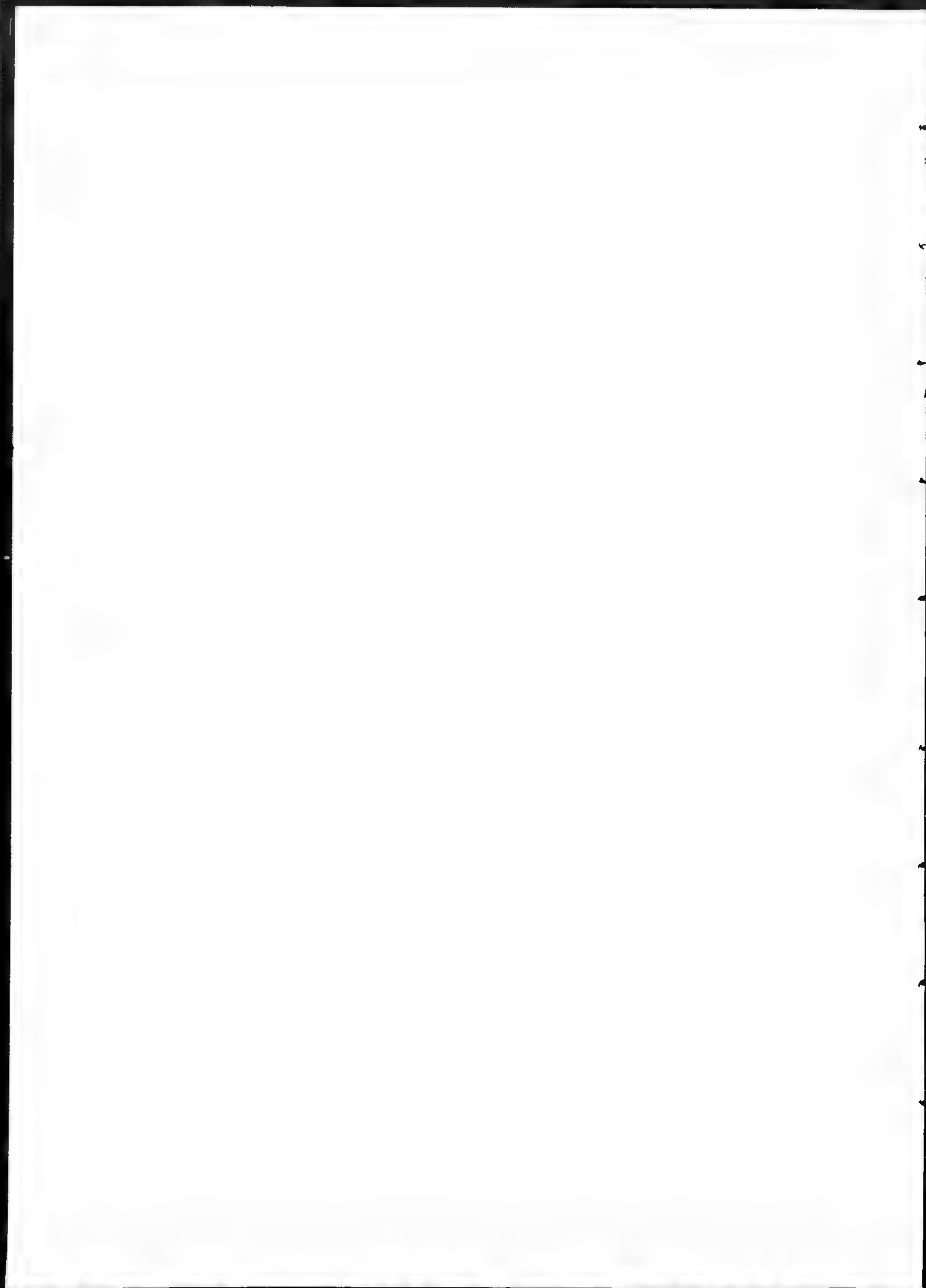
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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES J. LAUGHLIN  
ALLAN U. FORTE

Appellants, :

v. :

Nos. 19562 and 19563

UNITED STATES OF AMERICA :

Appellee. :

REPLY BRIEF

While we believe that all of the points have been covered in our original brief, it is our view that certain observations should now be made. The record will reflect that we have had intolerable delays in the preparation of the transcripts. In fact the last two volumes were only sent to this Court in December 6th--although the final deadline was October 11th.

Reading Non-Existent or Withdrawn Count

When the trial judge read to the jury in his final charge a count that charged a separate and distinct offense--a count that had been withdrawn--the error was prejudicial and reversible. It is more flagrant when it is considered that the trial judge made the mistake. Even though the appellants took the position that the prejudice could not be erased by the use of cautionary instructions there plainly was a duty on the part of the trial judge to attempt at least to cure the error.

In our original brief we referred to United States v. Gorman, 355 F.2d 151. In that case the trial judge read to the jury an erroneous indictment. The Court of Appeals said:

"We are at a loss to understand why the judge did not proceed to cure the error, made so early in the trial, by granting defendant's motion for a mistrial and immediately impaneling another jury."

The Court in the Gorman case made reference to the likelihood of the jury erasing the error from their minds and said:

"We can fairly assume however that what the jury would remember was only that Gorman and Roche had been accused of another robbery . . ."

In the instant case the indictment charged an attempt to influence Mrs. Smith. Therefore with the jury being told that the appellants were also charged with attempting to influence the witness Birge the prejudice resulting is evident. It is well to point out that when there was a discussion as to the prayers to be granted the matter of the Birge count came up. The trial judge said, "Birge is out of the case". See transcript.

SA 73-74

#### Reasonable Doubt

It is true, as the Government brief points out, that there is no Federal case holding that it is reversible error to refuse to charge that a reasonable doubt may arise from the lack of evidence. In the absence of such a case we contend the state cases are controlling.

Undoubtedly, Judge Matthes and Judge Devitt, in their very excellent work on Federal Jury Practice and Instructions set forth at page 18 of our brief, had this in mind.

#### Collateral Estoppel

The telephone records should not have been received in evidence. The opinion of Judge Curran in 226 Fed. Supp. 112 disposed of this matter. There is no question that the Government urged the Court

to litigate the matter of the telephone records. This was done in a motion for reconsideration after Judge Curran had dismissed the indictment, 223 Fed. Supp. 623. There was attached to the motion for reconsideration a number of telephone records. Clearly, Judge Curran held that these records were not admissible. He said in 226 Fed. Supp. 112:

"To argue from a phone company record showing a call between certain phone numbers that the persons whose names those phones are listed made the call is destructive of a very important rule of evidence; namely, that the person making the entry (in this case the telephone operator) should be making the entry based on personal knowledge. This principle has often been invoked in excluding entries made by a person who had no personal knowledge of the supposed facts recorded. (It hardly need be pointed out that this same rule applies with equal force to a person-to-person call, as there the operator has no personal knowledge of the real parties making the call, but only records the names given to her.)"

and continuing:

"With regard to the telephone company bills it should be noted that because the person in whose name the telephone is listed pays the bills for calls billed to his listing, it is no proof whatsoever that certain of those calls were made by him personally, as any of several people may have permission to use his telephone and this is especially true of a business phone."

This plainly was an issue of fact decided by the Court. The Government was not satisfied with the decision of Judge Curran and filed a notice of appeal with the United States Court of Appeals. This appeal was later abandoned (120 US App. D.C. at page 97, note 15). That therefore settles the matter. This Court said in Moore v. United States, 120 US App. D.C. 173:

"To invoke that doctrine (collateral estoppel) . . . a party must show that an important issue of fact has been previously litigated by the same parties and resolved by final judgment in the prior litigation."

In United States v. Cowart, 118 Fed. Supp. 903, 906, the Court said:

"... to bar the litigation of an issue, the same issue must have been determined favorably to the defendant, expressly, or by necessary implication in a previous proceeding between the same parties."

See, 54 Georgetown Law Journal, at 286.

#### Bias of the Grand Jury

We believe that this point has been well covered in our original brief. In our judgment the facts set forth, which cannot be disputed, clearly bring this case within United States v. Farrington, 5 Fed. 343. This is an old case but it is still cited.

The Government attempts to avoid a discussion of this point by contending that this Court in 120 US App. D.C. 93 passed upon this point. That is not true. The point was not discussed. The case was reversed on the matter of the unlawful recordings--that is to say that the Assistant United States Attorney violated the Federal Communications Act. That that point was plainly reversible there was no necessity for the Court to take up the other points. Of course the Court did give a direction as to the trial of the case in the Court below. It often happens in appellate procedure that when one point is plainly controlling the other points are not considered.

#### Fruit of the Poisonous Tree

The doctrine of the "fruit of the poisonous tree" has application here. There was illegal conduct on the part of Government officers. It was twofold: (a) Unlawful recordings or recordings made in violation of the Federal Communications Act; (b) Coercion of Mrs. Gross.

The test to be applied as called for by Wong Sun v. United States, 308 U.S. 338, is this:

"Whether granting establishment of the primary illegality the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Clearly the evidence in this case came to light as the result of the unlawful recordings. See 120 U.S. App. D.C. 93. In addition we have set forth in the Appendix the testimony of Mrs. Gross before the Grand Jury on two occasions on March 1, 1963. (JA 548-616  
In addition we have set forth the coercion of Mrs. Gross in the office of Mr. Hannon, Assistant United States Attorney. (JA 29-35  
It was plain that Mr. Hannon and Mr. Sullivan, also an Assistant United States Attorney, were not satisfied with Mrs. Gross' testimony before the Grand Jury and decided that they would make her testimony conform to their wishes. We have never known this to happen before. No case in this jurisdiction can be found where this was done. Under this heading we are not dealing with the coercion of Mrs. Gross as this will be treated at a later stage. However, it is well to consider this point along with the point involving the coercion of Mrs. Gross.

It is evident that Mr. Hannon and Mr. Sullivan resorted to illegal practices to force Mrs. Gross to do their bidding. They also forced to to engage in telephone recordings in violation of the law. Therefore, we have the "primary illegality" and it is plain that the evidence "has been come at by exploitation of that illegality." While the majority of the cases hold that the "fruits" doctrine applies to inanimate objects. In fact, Smith and Bowden v. United States, 117 U.S. App. D.C., 1; 324 F.2nd 879, said:

"The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized."

However, in the case of Smith and Anderson v. United States, 120 U.S. App. D.C. 160; 344 Fed.2 545, the testimony of an eyewitness was suppressed as an illegal fruit. As that case pointed out, it is now necessary to assess the attributes of "will, perception, memory and volition" to determine if they constitute a break in the chain from illegality to fruit.

The case of United States v. Tane, 329 Fed.2 848, 853--CCA 2, is controlling here. The court said:

*Exempt  
from*

"The testimony of Wesley Pase before the grand jury was the derivative product of the wiretap. We hold that the identity of Pase was derived from the wiretap and Pase was unwilling to testify or even admit to making any unlawful payments until possession of the wiretap of the December 6th conversation was revealed by the Assistant District Attorney. The government next contends that Pase's evidence was not subject to suppression because it was the product of an intervening act breaking the necessary nexus between the tap and the testimony. While the proffer of a living witness should not be 'mechanically equated with the proffer of inanimate evidentiary objects illegally seized', Smith and Bowden v. United States, 117 US App DC 1; 324 F(2) 879, the government has failed to carry its burden of showing that the information gained from the wiretap did not lead directly or indirectly to the discovery of Pase and Pase's willingness to testify United States v. Coplon, 185 F(2) 629. Indeed the record demonstrates that the identity of Pase and knowledge of his implication in unlawful payments was derived from the wiretap and that Pase was unwilling or even admit to making any unlawful payments until he was told by the Assistant District Attorney that the December 6th conversation between his attorney and union officials had been tapped. The road from the tap to the testimony may be long but it is straight."

Our factual situation is much stronger than that existing in Tane. We had not only the unlawful recordings but the unlawful activities of the Assistant United States Attorneys. The record plainly shows Mrs.

Gross unwillingness to testify until she was confronted with the tapes as well as the coercion practiced upon her.

Violation of Criminal Statutes by the Government

It is a little difficult to follow the reasoning of the Government in explaining away the violation of criminal statutes by Mr. Sullivan and Mr. Hannon. It is not denied--in fact the Government cannot deny--that crimes were committed by the agents of the Government and an attempt is made to gloss over the improper and illegal conduct with the statement that no harm has been done. It is well to review the facts. After Mrs. Gross had been thoroughly brainwashed, she was induced against her will to engage in certain recordings. These recordings violated the Federal Communications Act (Section 605, Title 47 USC). It cannot be argued that Mr. Sullivan and Mr. Hannon were inexperienced or were acting under the authority of superior officers. Both had had wide experience both in research and in the conduct of criminal cases. The contents of the recordings are set forth in United States v. Laughlin, 222 Fed. Supp. 264. In any event this Court held that the recordings violated the law. — stopped!

In the Joint Appendix (JA 563-566) there is recorded a telephone conversation between Mr. Sullivan and Mrs. Gross. It is apparent that Mr. Sullivan was concerned about how Mrs. Gross and Mrs. Smith should or should not report on their income tax return monies she had received from Dr. Forte. Sullivan was concerned as to the manner that Mrs. Smith should report on her income tax return money she had received from Mrs. Gross. There had been testimony that Dr. Forte had paid money to Mrs. Gross, an ex police officer, to obtain information

on Detective Wallace who had been "shaking down" Dr. Forte. Mrs. Smith at no time had received any money from Dr. Forte. Mrs. Gross had testified that she had turned over some of the money to Mrs. Smith and had kept some of the money herself. In any event Mr. Sullivan took it upon himself to advise Mrs. Gross how it should be reported on income tax returns. This is reflected in the Joint Appendix (JA 565-566)

We find this:

"Mr. Sullivan. I don't know how she considered it or how she would consider it on reflection. She might not consider it a gift or maybe wouldn't consider it an income . . . way you get money like that, don't talk about it, as a rule, but just a question to be aware of what might possibly come.

"Mrs. Gross. Why, if Forte deducted it.

"Mr. Sullivan. That is true too. He didn't. No, I checked."

This, of course, is a violation of law. It is uniformly recognized that only the President of the United States can permit access to income tax returns (excepting of course personnel of the Internal Revenue Service for investigational purposes). Even a Senate Committee cannot obtain such information without Executive approval.

Section 7213 of the Internal Revenue Code provides:

"It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income . . . or any particular thereof . . . and it shall be unlawful to print or publish in any manner whatever . . . any return or any part thereof . . . and any person committing an offense against the foregoing provision shall be guilty of misdemeanor and upon conviction thereof, shall be fined not more than \$1,000.00 or imprisoned not more than 1 year or both. . . if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

Appellant Laughlin testified before the Grand Jury on March 6, 1963. Within a few hours there was a recorded telephone conversation between Mr. Sullivan in Washington and Mrs. Gross in Baltimore. In this recording Mr. Sullivan, who was in charge of the Grand Jury, revealed Grand Jury testimony. It is set forth in Join Appendix (JA 572-573). The record shows that Mr. Sullivan was anxious to fully inform Mrs. Gross just what had transpired before the Grand Jury. The record reflects:

"Mr. Sullivan. (To Mrs. Gross.) I expect that there's at least a possibility that Laughlin might call you tonight.

\* \* \*

"Mr. Sullivan. He may possibly call you because he's before the grand jury today.

"Mrs. Gross. He was.

"Mr. Sullivan. And he doesn't know any Bernice Gross.

and to thoroughly brief Mrs. Gross as to the proceedings before the Grand Jury we find:

"Mr. Sullivan. . . . so I assumed he was trying to camouflage to the grand jury . . . . I did say this to him so he would think that I was trying to bluff him. I said 'if I told you Jean Smith that (sic) that Bernice Gross and Bernice Gross and you met this week in the National Press Building, what would you say about that?' and he said, 'Oh, that is a terrible lie!' So he assumed then that I was bluffing."

And Mr. Sullivan continued to reveal Grand Jury testimony to Mrs. Gross:

"Mr. Sullivan. . . . I also bore down on Lorraine and I said you know that Bernice said that Lorraine knew Bernice Gross and so on and so on . . . JA 577

Of course, Mr. Sullivan being an experienced attorney well knew that he could not reveal Grand Jury testimony without the consent of the Court. He did it of course under the assumption that he would never be found out.

What was done in this case was in clear violation of Rule 6(e), Rules of Criminal Procedure, and while there is no particular penalty attached it is assumed that criminal contempt would lie. In Blumenthal v. United States, 284 Fed.2 46, the Court said:

"Rule of secrecy surrounding grand jury proceedings must govern unless there is a clear showing of good cause."

As we have already stated, both Mr. Sullivan and Mr. Hannon were experienced Government attorneys and were well aware of the proprieties of the situation and, of course, it must be assumed that they knew what they were doing was wrong but it was done, no doubt, under the belief that it would never be detected.

Insofar as the violation of criminal statutes is concerned, it is interesting to see how this squares with the ruling of the Supreme Court on January 31, 1966, when the Court granted certiorari in the case of Hoffa v. United States (No. 794 Supreme Court). In granting certiorari the Court limited it to this question:

"Whether evidence obtained by the government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendments rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge."

It is plain that the Supreme Court of the United States will have no part in deceptive practices and expects a high ethical standard from its officers. This is well demonstrated in the concession made by the Solicitor General of the United States in the case of Schipani v. United States, No. 504 Supreme Court of the United States. The Solicitor General in his memorandum of November 28, 1966, issued this directive to all prosecuting officers:

"This Department must never proceed with any investigation or case which includes evidence illegally obtained or the fruits of that evidence. No investigation or case of that character shall go forward until such evidence and all of its fruits have been purged and we are in a position to assure ourselves and the court that there is no taint of unfairness. We must, also, scrupulously avoid any situation in which an intrusion into a confidential relationship would deny a fair hearing to a defendant or person under investigation." (Washington Post, page A16, December 1, 1966.

As we have said, the records in the trial before Judge Hart are part of the record in this case. At page 138, Proceedings of April 15, 1964, Mr. Sullivan testified to the effect that practically all of the conversations of appellant Laughlin with him were recorded.

In the recordings and monitoring Mr. Sullivan and Mr. Hannon violated the Department of Justice regulations. On December 12, 1961, the Deputy Attorney General Mr. White--now Justice White--advised the special committee of the House of Representatives:

"The Department of Justice does not use recorders wired into telephone circuits or induction-type attachments or types of instruments that could be used to monitor or record telephone conversations." (Report by the Committee on Government Operations --Union calendar 790, House Report No. 1898 (June 22, 1962).)

All of these unlawful activities on the part of Mr. Sullivan and Mr. Hannon were part and parcel of the prosecution and were utilized by both of them in bringing about the indictment in this case.

#### Coercion of Mrs. Gross

The record clearly demonstrates that Mrs. Gross was forced to do the bidding of Mr. Sullivan and Mr. Hannon. We recognize that in most instances it comes down to a question of credibility for the jury

to assess. However, in the situation existing here we contend it raises a constitutional question. We have already set forth that Mrs. Gross admitted she was in fear and felt it was a matter of self protection for her to cooperate. Of course, cooperation meant that she had to do the bidding of the prosecutors. The record reflects the various recordings between Mr. Sullivan and Mrs. Gross. In addition we have the visits made by Mr. Sullivan to her home in Baltimore--some 20 in number. In addition we have the following telephone calls between Mr. Sullivan and Mrs. Gross:

|                |                   |        |
|----------------|-------------------|--------|
| April 19, 1963 | Sullivan to Gross | \$ .55 |
| Sept. 12, 1963 | Sullivan to Gross | .75    |
| Sept. 12, 1963 | Gross to Sullivan | 2.35   |
| Sept. 6, 1963  | Gross to Sullivan | .35    |
| Sept. 5, 1963  | Gross to Sullivan | .60    |
| Sept. 13, 1963 | Sullivan to Gross | .75    |
| Sept. 9, 1963  | Sullivan to Gross | 1.25   |
| Oct. 11, 1963  | Sullivan to Gross | 1.15   |
| Sept. 16, 1963 | Sullivan to Gross | .85    |
| Sept. 11, 1963 | Sullivan to Gross | 1.75   |
| Sept. 9, 1963  | Sullivan to Gross | .45    |
| July 15, 1963  | Sullivan to Gross | .45    |
| Aug. 29, 1963  | Sullivan to Gross | .35    |
| Sept. 28, 1963 | Sullivan to Gross | .65    |
| Sept. 30, 1963 | Sullivan to Gross | .95    |
| Sept. 24, 1963 | Sullivan to Gross | 1.65   |
| Sept. 23, 1963 | Sullivan to Gross | .75    |
| Sept. 30, 1963 | Gross to Sullivan | .55    |
| Sept. 30, 1963 | Sullivan to Gross | 3.45   |
| Sept. 29, 1963 | Sullivan to Gross | .55    |
| Nov. 27, 1963  | Sullivan to Gross | 1.05   |
| Dec. 17, 1963  | Sullivan to Gross | 1.65   |
| Dec. 8, 1963   | Sullivan to Gross | .55    |
| Dec. 7, 1963   | Sullivan to Gross | .85    |
| Nov. 13, 1963  | Sullivan to Gross | .85    |
| Oct. 24, 1963  | Gross to Sullivan | .55    |
| Oct. 21, 1963  | Sullivan to Gross | 1.75   |
| Nov. 11, 1963  | Sullivan to Gross | .65    |
| Oct. 28, 1963  | Sullivan to Gross | .95    |
| Oct. 31, 1963  | Gross to Sullivan | .65    |
| Oct. 17, 1963  | Sullivan to Gross | 1.95   |
| March 5, 1963  | Sullivan to Gross | 1.35   |
| June 19, 1964  | Sullivan to Gross | .85    |
| June 18, 1964  | Sullivan to Gross | .55    |

|                |                   |                   |
|----------------|-------------------|-------------------|
| May 11, 1964   | Sullivan to Gross | \$1.25            |
| Nov. 27, 1963  | Sullivan to Gross | charge not listed |
| Dec. 4, 1963   | Sullivan to Gross | .55               |
| July 9, 1963   | Sullivan to Gross | .55               |
| April 2, 1964  | Sullivan to Gross | .55               |
| April 11, 1964 | Sullivan to Gross | .55               |
| April 27, 1964 | Sullivan to Gross | 1.05              |
| May 1, 1964    | Sullivan to Gross | .85               |
| May 27, 1964   | Sullivan to Gross | .75               |
| May 2, 1964    | Sullivan to Gross | 1.70              |
| March 13, 1964 | Sullivan to Gross | .65               |
| March 3, 1964  | Sullivan to Gross | .55               |
| Feb. 13, 1964  | Sullivan to Gross | 1.25              |
| April 28, 1964 | Sullivan to Gross | 1.95              |
| April 29, 1964 | Sullivan to Gross | .85               |
| March 21, 1964 | Sullivan to Gross | .55               |
| April 28, 1965 | Sullivan to Gross | charge not listed |
| April 8, 1964  | Sullivan to Gross | charge not listed |
| April 13, 1964 | Gross to Sullivan | .55               |
| Oct. 6, 1963   | Sullivan to Gross | 1.05              |
| Dec. 4, 1963   | Sullivan to Gross | 2.35              |
| Dec. 2, 1963   | Sullivan to Gross | .55               |

(This does not by any means represent all the calls between Mr. Sullivan and Mrs. Gross--many were made from public phones and we have no record of them. In addition many calls were made from Mr. Sullivan's home and we were unable to obtain his telephone records. Collect calls were also made to Mr. Sullivan's home and likewise those records are missing.)

It must be remembered that all of the calls were at the expense of the United States.

It is our view that since a constitutional question was involved that Mrs. Gross should not have been permitted to testify at all. That she was coerced admits of no dispute. It is clear that had the Government indicted Mrs. Gross her admissions could not have been used against her. No court would have permitted that. Then it would seem that it would necessarily follow that since her testimony was coerced she should not have been permitted to testify against appellants.

The case of People v. Albea, 2 Ill. 2nd, 317; 118 NE(2) 277, is helpful here. In that case we find the following:

"It is clearly apparent that the state's case must stand or fall on the testimony of Ora Lee Vaughan. Her competency as a witness therefore is the first issue for this court to determine. Plaintiff in error contends among other things that since this witness was discovered as a result of an illegal search she should not have been permitted to testify . . . ."

The Court reversed and took the view that she should not have been permitted to testify. See also, 32 Chicago Kent Law Review, 349-351; 24 University of Cincinnati Law Review, 151-153; and 30 New York University Law Review, 1121.

#### Violation of the Jencks Act

The record shows that Mr. Sullivan visited the home of Mrs. Gross in Baltimore and set up his recording apparatus in her bedroom. A recording was arranged between Mrs. Gross and Officer Wallace. See Joint Appendix (JA 494-506). The contents of that recording was utilized by Mr. Sullivan in preparing the instant case. However, since neither party consented to the recording, we were unable to utilize it at the trial. We say, therefore, that this was a violation of the Jencks Act and if the appellants were not entitled to the use of it then Mrs. Gross' testimony should have been stricken.

#### Public Policy and Lack of Fundamental Fairness

We believe that these points have been set forth in the original brief and need not be repeated here. It is difficult to see how our public policy could condone the practices indulged in.

#### No Evidence Indicating a Conspiracy

It is fundamental that before the declarations of a coconspirator can be received there must be evidence of the existence of a conspiracy.

In other words, there must be independent evidence of the defendant's participation in the conspiracy before the testimony can be received.

As Justice Jackson said, in Krulewitch v. United States, 336 US 440:

" . . . The prosecution must first establish prima facie the conspiracy and identify the conspirators . . . ."

In this case, Mrs. Gross was the main witness. As Judge Curran pointed out in 223 Fed. Supp. 623, the Government's case depended on Mrs. Gross and "without Mrs. Gross we have nothing". The witness Birge had no contact with appellant Laughlin and the witness Smith had no contact with either appellant. Therefore, no conspiracy had been shown before Mrs. Gross was permitted to testify. Of course, this case shows the grave danger existing in a conspiracy prosecution. See "The Krulewitch Warning", 54 Georgetown Law Journal, 133.

The failure to instruct on Dr. Forte's theory of defense and the conviction of Dr. Forte in North Carolina have already been covered in the original brief. (Joint Appendix, JA 119-111 JA 98

The participation of Officer Wallace in this case is apparent from the record. The statement was made by Mr. Sullivan that there was to be a Grand Jury investigation of Dr. Forte's accusation that Wallace had been "shaking him down". It was assumed that it would be a good faith investigation. Instead of investigating Wallace, Mr. Sullivan quickly took steps to vindicate him. In fact he virtually permitted Wallace to investigate himself. That there was no good faith inquiry is shown by reference to the first testimony of Wallace (Joint Appendix, JA 619-625 Mr. Wallace was then permitted to take over the investigation. See Joint Appendix (JA 619-623

To show that the accusation against Officer Wallace had a basis in fact the transcript of April 16, 1964 (Criminal 600-63) this occurred with Mrs. Smith on the stand:

"Mr. Laughlin. Now was there not a time or times that you talked to Mrs. Gross who talked about Wallace.

"Mrs. Smith. Oh yes she made quite a few remarks.

"Mr. Laughlin. Did she ever tell you that Wallace was paid off.

"Mrs. Smith. Yes.

"Mr. Laughlin. . . . on how many occasions.

"Mrs. Smith. Quite a few."

With Mr. Sullivan testifying on April 15, 1964 (Criminal 600-63) he was asked about the allegation against Wallace being investigated. He said:

"That was one of the factors. Mrs. Birge had stated too that Wallace had offered her money for perjured testimony and that was one of the factors. . . ."

Of course, all of this demonstrated that we clearly had the right to an instruction that there was a duty on the part of the Government to call Wallace and, in any event, we had the right to argue it.

#### Restriction of Cross Examination

We have referred to this in our original brief. Mrs. Gross refused to reveal to whom the \$500.00 was to be paid or the source of it. (Joint Appendix, JA 490-491) It could well be that Mr. Sullivan, who had such a deep interest in the case, was endeavoring to obtain the money for her.

### Denial of Instructions

It is plain that the trial judge did not have a full understanding of the law of conspiracy and the danger in permitting hearsay declarations to be made. It is our judgment that all of the instructions tendered by the appellants correctly stated the law. We will single out one in particular (JA 90 This was defendant's instruction No. 19. It is in all respects proper and is taken from the oft cited case of State v. Papa, 80 Atlantic 12. Not only did the trial judge refuse the instruction, but he invaded the province of the jury in his charge(JA 99

### Conclusion

This case reveals a shocking and revolting episode in law enforcement. Certainly not in this century has there been such a twisting and distortion of law enforcement methods. If either appellant were to meet someone on the street and relate to them just what was done in this case they simply would not believe him. It is understandable why Judge Youngdahl reacted in such fashion when he read the statement of the Deputy Foreman and Mrs. Sullivan:

"... but I will admit to you frankly, I was shocked when I read the testimony for the first time of the Deputy Foreman of the grand jury and of Mr. Sullivan."

and again:

"... but fortified by these two statements which shocked me, as I read them for the first time . . . ."

(Page 310 Criminal No. 599-63--October, 1963.)

Judge Youngdahl's remarks came after the Assistant United States Attorneys, Mr. Lowther and Mr. Sullivan, failed to disclose to him the circumstances of the recording. Of course, there was a duty on the part of both of them to make a full disclosure to the Court.

Of course, at that time Judge Youngdahl did not know that Mr. Sullivan and Mr. Hannon had violated various criminal statutes. It is assumed that Mr. Sullivan and Mr. Hannon did not indulge in the unlawful practices without having the consent of their superior, Mr. Acheson. However, we believe that Mr. Acheson can be excused. He was not versed in the field of criminal law and was no doubt taken advantage of. However, Mr. Sullivan Mr. Hannon and Mr. Lowther were all well experienced in the field of criminal law and criminal procedure. They had to know that the recordings were unlawful. They had to know that it is not ethical conduct (to put it in the most charitable light) to commit crimes to obtain evidence. What was said in United States v. Lee, 106 US 196, still has vitality:

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest are creatures of the law and are bound to obey it."

It is that Mr. Sullivan, Mr. Hannon and Mr. Lowther realized that they had an untutored superior and took advantage of it. It is like placing an ambitious chemistry student in a laboratory and giving him the right to try out all his new experiments--even though an explosion may result.

The practice of criminal law is not always a bed of roses. A lawyer must always be alert to carefully safeguard the rights of an accused. If he does not do that zealously he runs the risk of disciplinary action or perhaps a proceeding under Section 2255 of the New Judicial Code.

We ask, therefore, that the judgments below be reversed and that the mandate carry with it judgments of acquittal.

/s/ James J. Laughlin

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/s/ William J. Garber

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 19,562  
JAMES J. LAUGHLIN,  
Appellant

v.

UNITED STATES OF AMERICA,  
Appellee

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No. 19,563  
ALLAN U. FORTE,  
Appellant

v.

UNITED STATES OF AMERICA,  
Appellee

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No. 20,327  
JAMES J. LAUGHLIN,  
Appellant

v.

UNITED STATES OF AMERICA,  
Appellee

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MEMORANDUM OF AMICUS CURIAE IN SUPPORT OF  
PETITIONS FOR REHEARING EN BANC

United States Court of Appeals  
for the District of Columbia Circuit

FILED DEC 26 1967

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UNITED STATES COURT OF APPEALS  
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MEMORANDUM OF AMICUS CURIAE IN SUPPORT OF  
PETITIONS FOR REHEARING EN BANC

INTEREST OF AMICUS CURIAE

The National Capital Area Civil Liberties Defense and  
Education Fund (hereinafter, "the Civil Liberties Fund") is a

private, nonpartisan, and nonprofit institution organized as a tax exempt corporation for the purpose of defending and advancing the cause of civil liberties through litigation. The newly formed organization has assumed responsibility for all litigation formerly undertaken by the National Capital Area Civil Liberties Union. The Civil Liberties Fund supports the instant petitions for rehearing en banc because we believe that fundamental civil liberties questions have been raised in these appeals.

#### INTRODUCTION

Although these cases have received extended consideration by this Court and by a succession of District Judges, <sup>\*/</sup> there are three critical civil liberties issues which require en banc reconsideration. The first issue relates to the use of illegal evidence by the Grand Jury in returning the indictment in Nos. 19,562-63. The second issue relates to the question of whether

\*/ The initial perjury indictment against Appellant Laughlin was quashed by the District Court because it was based upon illegal wiretap recordings (223 F. Supp. 623). This Court has reversed appellants' initial convictions for conspiracy and corruption of a witness on the grounds that illegal wiretapping evidence was introduced into that trial (344 F.2d 187). In the most recent appeals, a wide variety of contentions were advanced, all of which were rejected by the panel's decision in Nos. 19,562-63, decided July 28, 1967. A separate panel in No. 20,327 affirmed Appellant Laughlin's conviction under a second perjury indictment by adopting, in effect, the findings of the panel in Nos. 19,562-63.

a defendant has standing to challenge the introduction of incriminating testimony coerced from a third person. The third issue raises the question whether these proceedings have been tainted by the activities of the prosecutor in securing the indictments and convictions.<sup>\*/</sup> We believe all three issues, not heretofore squarely considered by the Court in the light of all applicable precedents and considerations, should be reconsidered en banc by this Court.

#### ARGUMENT

- I. THIS COURT SHOULD ORDER REHEARING EN BANC TO DEFINE APPROPRIATE CONSTITUTIONAL AND SUPERVISORY STANDARDS WHERE A GRAND JURY RELIES UPON ILLEGAL EVIDENCE TO SUPPORT AN INDICTMENT.

The panel in Nos. 15,562-63 has sustained the validity of the conspiracy and corruption indictment in the following circumstances:

- (i) The indictment was based in substantial measure upon illegal wiretap evidence;

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<sup>\*/</sup> The initial argument -- the use of illegal evidence before the Grand Jury -- relates only to the Petition for Rehearing En Banc in Nos. 19,562-63. The second and third questions relate to all three appeals.

- (ii) The Grand Jury itself participated in the coercion which led to securing of the illegal wiretap evidence; and
- (iii) The Grand Jury considered testimony incriminating appellants which appears to have been coerced by the prosecutor.

The panel in Nos. 19,562-63 has, for the first time in this jurisdiction, expressly sanctioned the use of illegal evidence by a Grand Jury. We have found no prior cases in this Circuit justifying such a result. Moreover, the Supreme Court has never squarely considered the issue of utilizing illegally-secured evidence to return an indictment. <sup>\*/</sup>

Indeed, in the last term of the Supreme Court, the Solicitor General implicitly acknowledged the constitutional problems in using illegal evidence to influence a Grand Jury's decision. See West v. United States, No. 215 Misc., October Term 1966, Brief for the United States in Opposition to the Granting of the Petition for a Writ of Certiorari. There, the

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<sup>\*/</sup> Two recent Supreme Court cases, discussed infra at p.20 have referred to this question, but only in dictum.

Solicitor General emphasized that in the factual situation in West, there could not have been any prejudice because the illegal evidence did not relate to the count of the indictment on which petitioner was convicted. <sup>\*/</sup> However, the Solicitor General distinguished the West case in the following critical terms:

"There is no basis, therefore, for concluding that the suppressed evidence influenced the grand jury's decision to indict with respect to the transfer charge. [The West] case thus does not present the question whether an indictment wholly or substantially based upon illegally seized evidence can support a conviction." Id., pp. 4-5.

This instant appeal, of course, squarely presents the very question whether an indictment "substantially based upon illegally seized evidence can support a conviction".

\*/ The Solicitor General's brief stated: "Petitioner's indictment for illegally transferring marihuana was not invalid because of the consideration by the grand jury of illegally seized evidence in connection with a separate count, charging possession. The illegally seized evidence was suppressed prior to trial, and the prosecution on the possession count dismissed. The transfer count upon which petitioner was tried and convicted was based upon separate facts from those giving rise to the possession count -- the transfer count described an offense occurring on August 12, 1963, and the possession count an offense on August 23, 1963, with respect to a different quantity of marihuana." (Id., p. 4.)

A. The Grand Jury's Use of Illegal Evidence in Returning the Conspiracy and Corruption Indictment.

There can be no question that a central element in the prosecutor's presentation to the Grand Jury, leading to the return of the conspiracy and corruption indictment, was the introduction of recordings which have been held, beyond any dispute, to be illegal wiretaps in violation of Section 605 of the Communications Act of 1934. Laughlin v. United States, Nos. 19,562-63, Slip Opinion, p. 4; Laughlin v. United States, 344 F.2d 187, 192 (D.C.Cir. 1965); United States v. Laughlin, 226 F. Supp. 112, 114 (D.C.C. 1964); United States v. Laughlin, 223 F. Supp. 623, 625, 626 (D.D.C. 1963); United States v. Laughlin, 222 F. Supp. 264, 268-69 (D.D.C. 1963).<sup>\*/</sup> Indeed, the Grand Jury's reliance upon this very illegal wiretap evidence earlier led Judge Curran to dismiss the original perjury indictment. See 226 F. Supp. 112 (D.D.C. 1964); 223 F. Supp. 623 (D.D.C. 1963).<sup>\*\*/</sup>

<sup>\*/</sup> Hereafter the reported cases will be cited solely to their appropriate volume. The unreported decision of the Court in Nos. 19,562-63 will be referred to as "Slip Opinion".

<sup>\*\*/</sup> The second indictment -- charging conspiracy to obstruct justice and corruptly endeavoring to influence a witness -- withstood an identical motion to dismiss. 223 F. Supp. at 626. After this Court's reversal of Appellant Laughlin's initial conspiracy and corruption convictions, 344 F.2d 187 (D.C. Cir. 1965), upon remand, Appellant Laughlin moved again to dismiss the indictment as to that count. See Brief for Appellee, Nos. 19,562-63, p. 31.

Moreover, the Grand Jury not only received the illegal wiretap evidence, but actively participated in procuring it. The record in this case makes it absolutely clear that the statements of the Deputy Foreman of the Grand Jury constituted a major element in the coercion of Mrs. Gross to consent to the illegal wiretap. The key instance of such coercion came in the following colloquy between the Deputy Foreman, the prosecutor, and Mrs. Gross, the Government's key witness:

"DEPUTY FOREMAN" Mr. Sullivan, I would like to say this, and I think I speak for the Grand Jury, as regards what you said, that you would rather get the ones responsible for the over-all operation. If we don't get cooperation and can't get those we'll get the ones we can. I think you can tell this witness and any other witness, in or out of this room, that we'll go after him. We prefer the big ones but if they make it impossible for us to get the big ones we'll get the little ones.

"MR. SULLIVAN: Thank you Mr. Deputy Foreman. That's the point, Mrs. Gross. We really need your cooperation. We really do. May I ask you to wait when you leave the Grand Jury and let me suggest a program of operation to you?"

"A. Okay."

(See 222 F. Supp. at 267).

Significantly, Judge Youngdahl found that the Grand Jury was an active participant in securing the illegal evidence:

"\* \* \* the statements of both Mr. Sullivan and the deputy foreman of the grand jury, as quoted above, amounted to an implied promise that if Mrs. Gross consented to having the recordings made, she would not be indicted for perjury. Thus there was a clear 'hope of leniency', supra, in Mrs. Gross's mind, which hope was deliberately created by the implied promises of both Mr. Sullivan and the deputy foreman. Her consent, under the implied threat of being indicted if she did not cooperate and under the implied promise that she would not be indicted if she did cooperate, is not the kind of 'authorization' contemplated by 47 U.S.C. § 605, as Weiss makes abundantly clear. Mrs. Gross has not been indicted by the grand jury." 222 F. Supp. at 268-69. (Emphasis added.)

Finally, there is the serious question whether the testimony of Mrs. Gross before the Grand Jury, which seriously implicated appellants, was improperly coerced. It will be recalled that Mrs. Gross' initial testimony to the Grand Jury did not implicate appellants. Thereafter, after a period of interrogation in the Office of the United States Attorney, Mrs. Gross changed her story and implicated appellants. The circumstances of her changing her story strongly infer that the same pressures which were sufficient to constitute coercion as to the illegal wiretaps

were also sufficient to coerce her testimony in which she not only confessed to her own involvement in the conspiracy but also seriously implicated appellants.

Thus, this case presents a situation where the Grand Jury certainly considered illegal wiretap evidence and actively participated in securing such illegal evidence. Further, there is the strong probability that the testimony of Mrs. Gross implicating appellants was coerced. Nevertheless, the panel, per Judge Coffin, sustained the conspiracy and corruption indictment. Slip Opinion, pp. 6-7. It sanctioned the introduction to and use by the Grand Jury of illegal wiretap evidence on the ground that it believed there was other lawful evidence before the Grand Jury which, on abstract analysis, might have been sufficient to support the indictment. In reaching this result, the panel has extended the rule of the Supreme Court in the Costello case<sup>\*/</sup> from the use of hearsay evidence before the Grand Jury to the introduction of illegal evidence before the Grand Jury. As we point out, infra, the Costello rule relates only to technical rules of evidence; it has absolutely no bearing upon the use of illegal evidence.

<sup>\*/</sup> Costello v. United States, 350 U.S. 359 (1956).

The panel has propounded what is, in effect, a harmless error rule to be applied when the Grand Jury relies upon evidence secured by the prosecution in violation of Federal statutes. See Slip Opinion, pp. 6-7. This harmless error rule has no proper application where evidence is illegally secured. Indeed, the standard adopted by the panel can promote the procuring of illegal evidence, because prosecutors will be secure in the knowledge that they will be free to use such evidence before a Grand Jury, although it cannot be introduced at trial. We believe that appropriate exclusionary policies -- designed to effect compliance with federal statutes by law enforcement officials -- require that illegal evidence not be utilized as the basis of a prosecution -- at the indictment or the trial stages. This significant and novel issue deserves, we believe, en banc consideration by the Court.

B. The Costello Rule Permits Grand Juries to Deliberate Unencumbered by "Technical Rules" of Evidence. Costello Did Not Sanction the Use of Illegal Evidence.

In Costello, petitioner asserted that an indictment based solely upon hearsay evidence was constitutionally defective and,

in any event, should be quashed pursuant to the Court's supervisory powers. The Supreme Court rejected both arguments. 350 U.S. 359 (1956).

However, in holding that hearsay evidence could be used before a Grand Jury to support an indictment, it is perfectly clear that the Supreme Court considered that the inadmissibility of hearsay was merely a "technical rule" of evidence from which Grand Juries have traditionally been free.<sup>\*/</sup> Thus, Mr. Justice Black stated,

"\* \* \* in this country as in England of old the Grand Jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." 350 U.S. at 362. (Emphasis added.)

Justice Black stated that to sustain petitioner's contention that hearsay was an inadequate basis for an indictment,

"would run counter to the whole history of the grand jury institution, in which laymen conducted their inquiries unfettered by technical rules." Id., at p. 364. (Emphasis added.)

<sup>\*/</sup> Cf., marital privilege not applicable, in U.S. v. Beaver, 8 Alaska 83 (D.C. Terr. Alaska 1929).

Thus, he found "no persuasive reasons" to accept petitioner's  
\*/  
contentions.

This Court has likewise noted that "the nature of [the Grand Jury's function] \* \* \* contemplates it will hear from many sources uninhibited by the strict rules of evidence applicable at trial \* \* \*". Coppedge v. United States, 311 F.2d 128, 132 (D.C.Cir. 1962), cert denied, 373 U.S. 946 (1963). Again, in that case this Court did not consider the use of illegal evidence.

C. The Exclusionary Rule Requires  
That a Grand Jury Not Base an  
Indictment Upon Illegal Evidence.

Although it is not unreasonable to conclude that a grand jury can properly proceed "unfettered" or uninhibited" by formal and technical rules of evidence, it is a totally different matter where the evidence is illegal -- secured, as here, by the prosecutor in violation of federal law, with the active participation of the Grand Jury.

\*/ Lower courts have likewise held that indictments can be based upon hearsay evidence. See Crump v. Anderson, 352 F.2d 649, 651 (D.C.Cir. 1965); In re McClelland, 260 F. Supp. 182, 188 (S.D. Tex. 1966). See generally, Anno., Competency or sufficiency of evidence before grand jury as affecting validity of indictment or conviction in federal court, 100 L.Ed. 404; Anno., Quashing indictment for lack or insufficiency of evidence before grand jury, 59 A.L.R. 567; Anno., Power of court to pass on competency, legality, or sufficiency of evidence on which indictment is based, 31 A.L.R. 1479; Anno., Indictment based on evidence illegally procured, 24 A.L.R. 1432.

Section 605 of the Communications Act of 1934,<sup>\*/</sup> forbidding wiretapping, is no "technical rule". Those provisions prohibit any unauthorized persons "from violating the integrity of a telephone conversation \* \* \* ". United States v. Tane, 329 F.2d 848, 852 (2d Cir. 1964). "[E]vidence acquired from a statutory violation [of Section 605] may not be used to obtain a federal conviction." Ibid. In enacting the prohibitions of Section 605, Congress outlawed "resort to methods deemed inconsistent with ethical standards and destruction of personal liberty". Nardone v. United States, 302 U.S. 379, 383 (1937). See also, Nardone v. United States, 308 U.S. 338, 340 (1939).

An extended line of cases requires that the prosecution should not be afforded the use and benefit of illegal wiretap evidence. See extensive citation of authority in Anno., Admissibility of evidence obtained by wiretapping as affected by § 605 of Federal Communications Act -- federal cases, 2 L.Ed. 2d 1603 and 97 L.Ed. 237.

The exclusion of illegal evidence has been explained in the following terms:

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\*/ Section 605 Provides:

"\* \* \* no person not being authorized by the send shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person \* \* \*."

"The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960).

In terms of "removing the incentive" and denying the prosecution the benefit of illegal evidence, there is no justifiable distinction between the indictment stage of a proceeding and the trial stage. It has been observed that, "To the extent that the Grand Jury provides a forum in which illegally obtained evidence can be utilized, the exclusion policy articulated in Weeks v. United States, 232 U.S. 383 (1914), will be undermined". Note: Exclusion of Incompetent Evidence from Federal Grand Jury Proceedings, 72 Yale L.J. 590, 595 (1963).

In applying this principle, district courts have repeatedly dismissed indictments which were prompted by illegal evidence. In United States v. Baron, 115 F. Supp. 674, 678 (S.D.N.Y. 1953), where an indictment was based upon evidence secured from defendants in violation of their rights against self-incrimination, the district court held it "has inherent power, in its discretion, to dismiss indictments obtained in violation of the rights of

the defendants". In United States v. Tane, supra, the district court dismissed an indictment based "almost exclusively" upon evidence which had been secured by an illegal wiretap. 329 F.2d at 854. And in United States v. Guglielmo, 245 F. Supp. 534, 536 (N.D. Ill. 1965), in a case involving illegal wire-tapping, the Court dismissed the indictment, holding:

"Since it is clear that but for the above described violation of § 605 no warrant would have issued and no indictment would have been returned, the indictments against the defendants tied ineluctably with the illegal wiretapping, must be and accordingly are hereby dismissed."

In United States v. DiGrazia, 213 F. Supp. 232 (N.D. Ill. 1963), Judge Will dismissed an indictment where defendants had been brought before the grand jury with no warning of their Fifth Amendment rights against self-incrimination. The Court dismissed the indictment as to the first defendant even when he found that this defendant made "no direct incriminating statement". Id., at 234. The Court held:

"There is no way to know whether in fact his appearance was incriminating in the minds of some or all the members of the Grand Jury. Certainly on the record before me, I cannot say that his testimony might not have tended to incriminate him. \* \* \*

"Whether constitutional rights have been respected should not be the subject of speculation. Where, as here, there is doubt, the only proper action is to dismiss the indictment."  
Ibid. (Emphasis added.)

And, as to the second defendant in DiGrazia, "it [was] conceded that she gave no incriminating testimony before the Grand Jury".

Ibid. The Court explained this dismissal of the indictment against her in the following critical terms:

"\* \* \* there is no way of knowing on what basis the Grand Jury returned the indictment against Rose Calzavara. In fact, absent any record of the proceedings, there is no way to ascertain accurately whether any other evidence at all involving her was presented. But even assuming the presentation of other evidence which, in itself, would have warranted the indictment, it must necessarily be pure speculation as to whether that evidence or the prejudicial conduct of the prosecutor or both prompted the Grand Jury's action." Id., at p. 235. (Emphasis added.)

The Court then explained:

"The Grand Jury exists as an integral part of Anglo-American jurisprudence for the express purpose of assuring that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the government or private persons. United States v. Wells, D.C.D. Idaho 1908, 163 F. 313, 324. In this regard, it is well to remember Mr. Justice Brandeis' admonition that '[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.' Olmstead v. United States, 277 U.S.

438, 479, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (dissenting opinion). It is the duty of a prosecutor presenting a case to a Grand Jury not to inflame or otherwise improperly influence the jurors against any person. \* \* \*

"These principles are so well grounded in our jurisprudence as not to require elaboration. Their application here leaves me no alternative but to dismiss the indictment against Rose Calzavara as well." Ibid.

Finally, at an earlier stage in this very case, Judge Curran dismissed the original perjury indictment, holding that the presentation of illegal wiretap evidence to the Grand Jury required the dismissal of the indictment, even if additional lawful and competent evidence had been presented to the Grand Jury which, by itself, might have supported the indictment. \*/

Judge Curran ruled:

"\* \* \* an indictment based on incompetent evidence, even though returned by a legally constituted and unbiased grand jury, should not be allowed to stand. If this were not so, the only reason the trial court could order the disclosure of grand jury proceedings would be where a proper case had been made alleging bias.

\*/ It should be noted that certain lower courts have held, erroneously we believe, that there is no distinction between presenting illegal and hearsay evidence to the Grand Jury. United States v. Birrell, 242 F. Supp. 191, 205 (S.D.N.Y. 1965); United States v. Grosso, 225 F. Supp. 161, 175 (W.D. Penn. 1964); United States v. Block, 202 F. Supp. 705, 707 (S.D.N.Y. 1962).

However, that the trial court may request the grand jury proceedings be disclosed where an adequate showing that the evidence before the grand jury was invalid is a proposition that needs no citation.

"It is also true that an indictment will not be dismissed if there is some incompetent evidence before the grand jury, as long as there is sufficient competent evidence to sustain it. However, there may be competent evidence and illicit evidence before the grand jury and the two may be so intertwined that the Court is unable to say (even if it considered the competent evidence sufficient) that the grand jury did not in fact return the indictment primarily influenced by the illicit evidence. That, the Court considers to be the case here. Evidence was presented to the grand jury in this case which was in disregard of the accused's rights, and was obtained even in the face of 47 U.S.C. § 605." 226 F. Supp. at 114.

The illegal evidence rule enunciated by Judge Curran, like the rule relied upon in the other district court cases cited above, is directly contradictory to the "harmless error" approach used by the panel. We submit that the proper constitutional and supervisory standard is to order dismissal of any indictment which was the product -- to any significant degree -- of illegal evidence. Only in that fashion can the

command of the federal prohibitions against wiretapping be given full weight.<sup>\*/</sup>

Moreover, such a rule would give proper recognition to the "high place [the Grand Jury has] held as an instrument of justice". Costello v. United States, supra, 350 U.S. at 362. "The basic purpose of the English Grand Jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." Ibid. The Grand Jury,

"has been regarded as a primary security to the innocent against hasty, malicious and oppressive prosecution; it serves the invaluable function in our society of standing between the accuser and the accused \* \* \* to determine whether a charge is founded upon reason or . . . by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390 (1962).

Indeed, if the panel's holding which sanctions the use of illegal evidence is sustained, the Grand Jury as a forum for the protection of the defendant will be substantially derogated. That body will be free to secure and act at will upon illegal evidence supplied by prosecutors.

<sup>\*/</sup> The Eighth Circuit in West v. United States, 359 F.2d 50, 56 (8th Cir. 1966), cert. denied, 385 U.S. 873 (1966), has held that

"the judicial policy which brought about the exclusionary rule would not be advanced in any significant degree by extending its application to grand jury proceedings."

We believe that this decision cannot be squared with the history and justification of the exclusionary rule.

D. The Application of the Exclusionary Rule to Grand Jury Proceedings is Not Inconsistent With Prior Rulings of the Supreme Court or This Court.

The Supreme Court has never squarely dealt with the necessity of excluding illegal evidence from grand jury deliberation. <sup>\*</sup>/ The Costello case, supra, dealt only with "technical" <sup>\*\*</sup>/ issues of hearsay evidence. The more recent Lawn decision <sup>\*\*\*</sup>/ held that a district court need not order a pretrial hearing into grand jury proceedings on "unsupported suspicions" that a grand jury might have used illegal evidence. <sup>\*\*\*</sup>/ Of course, in the instant appeal there is no mere suspicion. On four separate occasions, the wiretap evidence considered by the Grand Jury has been declared illegal.

<sup>\*</sup>/ In the venerable decision of Holt v. United States, 218 U.S. 245, 247-48 (1910), in an ambiguous factual situation, the Court refused to dismiss an indictment where "evidence in its nature competent, but made incompetent by circumstances [not otherwise defined] had been considered along with the rest" by the Grand Jury. Id., p. 248. Significantly, Holt was decided four years before Weeks v. United States, 232 U.S. 383 (1914), which established the federal exclusionary rule for illegally seized evidence.

<sup>\*\*</sup>/ Lawn v. United States, 355 U.S. 339, 349 (1958). Cf., United States v. DiFronzo, 345 F.2d 383, 384 (7th Cir. 1965), cert. denied, 382 U.S. 829 (1965); United States v. Giglio, 16 F.R.D. 268, 269-70 (S.D.N.Y. 1954), aff'd, 355 U.S. 339 (1958).

<sup>\*\*\*</sup>/ In the recent Blue case, the Supreme Court was not presented with the issue of illegal evidence being tendered to the Grand Jury. United States v. Ben Blue, 384 U.S. 251 (1966).

Further, we have found no prior decisions of this Court involving the use of illegal evidence before the Grand Jury. The panel apparently relied upon dictum in Coppedge v. United States, 311 F.2d 128, 131 (D.C. Cir. 1962), cert. denied, 373 U.S. 946 (1963), although there was no evidence in that case secured by the prosecutor in violation of law. <sup>\*/</sup>

E. Applying Proper Constitutional and Exclusionary Standards, the Conspiracy and Corruption Count Should Have Been Dismissed.

As we pointed out above, the Costello standard is inapplicable in circumstances where illegal evidence is presented to the Grand Jury. We suggest that the exclusionary policies described above require that an indictment must be dismissed if illegal evidence might have had some probable significance in the indictment's return. <sup>\*\*/</sup> Based upon this standard, there can be

<sup>\*/</sup> Another recent decision of this Court, Crump v. Anderson, 352 F.2d 649, 651 (D.C. Cir. 1965), related to the requirement of a preliminary hearing to determine if probable cause existed to justify the indictment.

<sup>\*\*/</sup> This causal connection would not force a result inconsistent with West v. United States, 359 F.2d 50 (8th Cir. 1966), cert. denied, 385 U.S. 867 (1966), where the illegal evidence related only to a count that was dismissed and had nothing to do with the count that was sustained.

no question that the conspiracy and corruption indictment should have been dismissed.

The interplay of the illegal wiretaps with the testimony of those witnesses who appeared before the Grand Jury has already been discussed in a prior decision of this Court reversing Appellant Laughlin's initial conviction. 344 F.2d 187 (D.C. Cir. 1965). That decision, written by Judge Wright, considered the prejudicial effect, at trial, of the introduction of the illegal wiretaps. We believe that there is no justifiable distinction between the effect of these recordings upon the petit jurors and grand jurors.

After reviewing the evidence presented at trial, this Court concluded that the playing of the illegal recordings might have contributed to the convictions:

"In the recorded conversations, the parties apparently assume the occurrence of the transactions which Mrs. Gross had related. After hearing the recordings, the jury would certainly tend to give more credence to Mrs. Gross' entire testimony than if they had not heard them. Since the conviction of appellants on each count depended heavily on the testimony of Mrs. Gross, we cannot say that there was not 'a reasonable possibility that the evidence complained of might have contributed to the conviction.' The court's limiting instruction does not cure the prejudicial effect of evidence which is competent against neither Forte nor Laughlin. We therefore hold that the convictions of both appellants on each count of the indictment should be reversed." Id., at pp. 192-93.

We believe that this finding, albeit in the context of trial, demonstrates most persuasively that before the Grand Jury the same use of the illegal recordings well might have had a direct causal relation to the return of the conspiracy and corruption indictment. This situation meets the standards set forth by Judge Curran in dismissing the initial perjury indictment, that although there may be other "competent and relevant evidence before the Grand Jury" in addition to the illegal evidence,

"the two may be so intertwined that the Court is unable to say (even if it considered the competent evidence sufficient) that the Grand Jury did not in fact return the indictment primarily influenced by the illicit evidence." 226 F. Supp. 112, at 114 (D.D.C. 1964).

On the basis of this application of a proper standard, the conspiracy and corruption indictment must be dismissed. \*/

\*/ We believe that Judge Wright's opinion in the first appeal set forth the central evidence before the Grand Jury. 344 F.2d 187 at 192-93 (D.D.C. 1965). One cannot know what evidence the panel in the recent appeal might have relied upon in concluding that, in addition to the illegal evidence, "there was ample competent evidence before the Grand Jury to justify bringing the defendants to trial on the conspiracy charge". Slip Opinion, p. 7. The panel never described what that evidence might be. Further, the Government's Brief in Nos. 19,562-63 does not refer to any "ample competent evidence". Its argument there was limited to the assertion that the prior appeal (344 F.2d 187 (D.D.C. 1965) rejected the dismissal argument "by implication". See Brief for Appellee, Nos. 19,562-63. Significantly, in that prior appeal (Nos. 18,711-12), leading to the decision reported at 344 F.2d 187 (D.D.C. 1965), the Government also made no reference to any additional "competent evidence". See Brief for Appellee, Nos. 18,711-12. Finally, Judge Curran made no reference to any evidence which would justify sustaining the conspiracy and corruption indictment. 223 F. Supp. at 626. Thus, in this extended proceeding, there has never been any judicial specification of this other "competent evidence".

II. THE COURT SHOULD ORDER REHEARING EN BANC  
TO CONSIDER WHETHER APPELLANT LAUGHLIN  
HAS STANDING TO CHALLENGE THE COERCED  
TESTIMONY OF A KEY GOVERNMENT WITNESS.

The second issue on which an en banc hearing should be granted is whether Appellant Laughlin has standing to exclude Mrs. Gross' testimony which was "obtained under possible coercive circumstances \* \* \*". Slip Opinion, p. 9. The panel held that Appellant Laughlin could not object to the introduction of the testimony, even if the testimony was coerced.<sup>\*/</sup> In holding that his rights were limited to testing the credibility of Mrs. Gross' testimony, the panel stated:

"\* \* \* the appellants were afforded and they exercised full opportunity on cross-examination to bring out, not only the circumstances of Mrs. Gross's prior statements to the United States Attorneys, but also her prior perjury before the grand jury and her hope of escaping indictment for her own part in the conspiracy." \*\*/

\*/ Ibid. The panel did not reach the issue of whether, in fact, Mrs. Gross' testimony was coerced. Rather, it assumed that it was; the Court held, nevertheless, that Appellant Laughlin could not challenge it. If rehearing en banc is granted, both the question of standing and the issue of coercion should be fully explored.

\*\*/ In so ruling, the panel adhered to the earlier decision of this Court in Long v. United States, 360 F.2d 829, 833-34 (D.C. Cir. 1966), petition for rehearing en banc denied, June 23, 1966.

This ruling of the panel is inconsistent with recent Supreme Court decisions justifying the exclusion of evidence secured in violation of a constitutional mandate. Further, in any event, as a matter of due process, coerced testimony should be excluded, on the motion of any person implicated by such testimony, because of the basic unreliability of such testimony.

A. The Panel's Reliance Upon a "Personal Rights" Theory of Standing to Exclude Coerced Testimony is Inconsistent With the Supreme Court's Justification of Exclusionary Rules on the Grounds of Deterrence.

The panel's rejection of Appellant Laughlin's challenge that Mrs. Gross' testimony was coerced before the Grand Jury and at trial, and therefore should be excluded, is based upon a narrow view of those persons who can complain about a violation of a third party's constitutional rights. The panel's reasoning proceeds upon,

"\* \* \* the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given'." Jones v. United States, 362 U.S. 257, 261 (1960).

Thus, in Jones v. United States, supra, the Supreme Court held, as regards standing to challenge illegally-seized evidence, that,

"In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. \* \* \*"  
362 U.S. at 261.

Subsequently, in Wong Sun v. United States, 371 U.S. 471, 492 (1963), in a brief comment, the Supreme Court held that a defendant could not challenge the introduction of evidence illegally seized from a third party.

Proceeding on this narrow theory, it could be said -- as the panel apparently did -- that the only person whose rights were violated when Mrs. Gross was coerced to confess was Mrs. Gross herself. If she did not complain, no one could.

This stringent reading of the standing to challenge evidence illegally secured cannot be squared with more recent Supreme Court decisions explaining the exclusionary rule. Thus, in Linkletter v. Walker, 381 U.S. 618, 637 (1965), the Court "abandoned the personal incrimination theory and accepted a general deterrent rationale, pointing out that the real persons the exclusionary rule seeks to protect are the unknown potential victims of unreasonable police conduct".<sup>\*/</sup>

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<sup>\*/</sup> Note, Standing to Object to an Unreasonable Search and Seizure, 34 U.Chi.L. Rev. 342, 352-3 (1967).

Thus, the Court concluded that:

"\* \* \* 'in rejecting the Wolf doctrine as to the exclusionary rule [that the rule does not apply to the states] the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. \* \* \*'." 381 U.S. at 637.

Subsequently, in Tehan v. United States ex rel Shott, 382 U.S. 406 (1966), dealing with self-incrimination, deterrence of illegal conduct was characterized as the "single and distinct" purpose of the exclusionary rule.

These later cases require, we believe, a reassessment of those persons who have standing to challenge evidence illegally secured. <sup>\*/</sup> Significantly, this question of standing is not a constitutional issue. Rather, it is "only a rule of practice" for the court. Barrow v. Jackson, 346 U.S. 249, 257 (1953).

The exclusionary rule, based on the rationale of deterrence, has recently been characterized as follows:

"\* \* \* The underlying assumption of the rule is that the incentive for conducting illegal searches and seizures will be largely destroyed if prosecutors are barred from using the fruit in a

\*/ "Linkletter and its progeny add up to the conclusion that the Court is now operating under a general deterrence theory of the exclusionary rule. Since the Jones - Wong Sun standing doctrine has never been examined under this theory, a reappraisal of its current validity is in order." Note, Standing to Object to an Unreasonable Search and Seizure, 34 U.Chi.L. Rev. 342, 356 (1967).

criminal prosecution. And it is argued that if the incentive is reduced, the police will have less reason to violate the individual's right of privacy." United States ex rel De Forte v. Mancusi, 349 F.2d 897, 904 (2d Cir. 1967).

We believe that the same rule must apply to confessions and testimony which are the product of police or prosecutorial coercion. As the Supreme Court said in Spano v. New York, 360 U.S. 315, 320-21 (1959):

"[T]he abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the policy must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminal as from the actual criminals themselves."

To deter, to remove the incentive to coerce confessions, the prosecution should have no right, at any place and in any forum, to exploit them. <sup>\*/</sup> This rule has long been accepted in California where Mr. Justice Traynor has written:

\*/ Cf., the following comment from Comment, Developments in the Law of Confession, 79 Harv.L.Rev. 938, 969 (1966):

"(b) Due Process and Police Practices. -- The emphasis in cases such as Rogers on the presence in the record of claims of 'coercion' has led many courts and commentators <sup>120/</sup> to interpret the exclusionary rule of the Supreme Court confession cases as analogous to the rule excluding the products of an unlawful search or seizure. The Court has been seen as treating 'outrageous' or 'illegal' conduct during interrogation as the unconstitutional primary (con't on p. 29)

"\* \* \* 'Since all the reasons that compelled us to adopt the exclusionary rule are applicable whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights.'" People v. Martin, 45 Cal.2d 755, 761, 290 P.2d 855, 857 (1955).

In this case the panel made clear that, even if Mrs. Gross' testimony was coerced, Appellant Laughlin could not complain. We believe that, in light of the most recent Supreme Court decisions cited above, this Court should consider en banc whether it should discard the narrow standing theory of the panel which is based on the obsolete "personal rights" concept and adjust its rules of practice to give maximum effect to the purpose of the exclusionary rules -- to deter illegal prosecutorial and police practices.

[fn. con't from p. 28]

activity of the police; the exclusionary rule for confessions, like that in the search and seizure cases, is thought to provide an effective remedy to victims of improper conduct and to deter improper interrogations by removing any incentive to engage in them. \* \* \*

120/ E.g., Paulsen, The Fourteenth Amendment and the Third Degree, 6 Stan.L.Rev. 411, 417-23, 429-31 (1954); Ritz, Twenty-five Years of State Criminal Confession Cases in the U.S. Supreme Court, 19 Wash.&Lee L.Rev. 25, 42-43 (1962).

B. Coerced Testimony Should be Excluded Upon Challenge by Any Person Incriminated by Such Testimony, Because of the Basic Unreliability of the Testimony.

Even if the Court adheres to the ruling in Jones and Wong Sun denying a defendant's standing to challenge illegally-seized evidence from a third person, a different rule should prevail in the case of coerced confessions and testimony.

Beyond any dispute, illegally-seized evidence is itself reliable and intrinsically competent evidence; it is excluded to require adherence to the constitutional mandate. However, in contrast, coerced confessions or coerced testimony are essentially unreliable; since they are the product of duress, one cannot rely upon their veracity. This very fact of their unreliability is a major reason why coerced confessions are excluded. See cases collected in Comment, Developments in the Law of Confessions, 79 Harv.L.Rev. 939, 954-69 (1966).

We believe that any person implicated by coerced testimony should have the right to challenge this essentially unreliable testimony. Because of the unreliable nature of the testimony, any person incriminated by coerced testimony is deprived of his constitutional rights to due process of law if such coerced

testimony is used to incriminate him. This serious constitutional issue has been recognized in United States v. Wolfe, 307 F.2d 798, 801 (7th Cir. 1962), where the Court of Appeals stated:

"We are not unmindful that a case might well arise where the procurement of evidence to be used in a federal prosecution might have been obtained by proved coercion violative of the constitutional rights of a witness and that a serious question might arise in that event upon the use of such evidence upon the trial of defendant. However, such a case is not before us now . . ."

There can be, we believe, no valid distinction in this regard between coerced confessions and coerced testimony incriminating third persons. Indeed, coerced testimony incriminating a third party is even more unreliable than a coerced confession. A confession will implicate the speaker. How much easier it is for a speaker, under coercion, to implicate a third party. Thus, to the degree that coerced confessions are excluded because of their unreliability, so must be coerced testimony secured under the same circumstances implicating a third party. See Comment, The Right of a Criminal Defendant to Object to the Use of Testimony Coerced from a Witness, 57 Northwestern L.Rev. 549 (1962).

The panel's suggestion that any prejudice can be vitiated by the defendant's cross-examining the coerced testimony is clearly insufficient. In the parallel coerced-confession situation, such unreliable evidence is excluded entirely.

The inadequacies of relying upon cross-examination to cure the defect is aptly demonstrated in this case. Here, the panel assumed that Mrs. Gross' testimony to the Grand Jury implicating Appellant Laughlin was coerced. Mrs. Gross then testified in a fashion consistent with her coerced testimony before the Grand Jury. At trial, it is perfectly clear that Mrs. Gross was in the position of being forced to persist in her earlier story, whether it was true or not, because to testify otherwise would be to risk a perjury conviction and to subject herself to the possibility of being joined in the indictment which was the basis for the assumed coercion in the first place. Obviously, in the face of these circumstances, granting the defendant the opportunity to cross-examine Mrs. Gross simply cannot provide adequate redress for the essential unreliability and unworthiness of her testimony. This testimony should be excluded outright.

We believe that the issue of standing to challenge coerced confessions and testimony should be reconsidered en banc by this Court. As we point out, there is a critical distinction between illegally-seized evidence, which is essentially reliable, and coerced incriminating testimony, which is essentially unreliable. In its Long decision (360 F.2d 829), this court has not recognized the essential differences between those two types of evidence. This issue should be reconsidered en banc by this Court.

III. THE COURT SHOULD CONSIDER EN BANC WHETHER  
THE COURSE OF CIRCUMSTANCES LEADING TO THE  
INDICTMENT TAINTED THE PROCEEDINGS.

The Court should also grant an en banc rehearing to consider whether the entire proceedings have been tainted by the following circumstances, all of which were recognized in the panel's opinion in Nos. 19,562-63:

- (i) The playing of illegal wiretaps to the Grand Jury, which wiretaps had been secured as a result of pressures from the prosecutor and the Grand Jury.
- (ii) The use of Officer Wallace, who the Court noted "was himself an object of the Grand Jury's investigation" as chief investigator for the police. Slip Opinion, p. 8. The panel stated that they were "at least surprised" with this fact, and that the "effect may well have been equivalent to the endorsement of his trustworthiness by the United States Attorney's office".
- (iii) The presentation by the prosecutor of certain accusations against Appellant Laughlin "injected gratuitously by [the prosecutor] in a way that could

have prejudiced Laughlin unfairly". Slip Opinion p. 8. The Court stated that "although we may condemn this incident as bad practice in the abstract, we are not persuaded that the defendants were substantially prejudiced by it".

(iv) The presentation of Mrs. Gross' testimony to the Grand Jury which was "obtained under possible coercive circumstances . . .". Slip Opinion, p. 9.

We believe that the combination of these facts and circumstances, taken together, well might taint the entire proceeding. We think that the Court should order rehearing en banc on this point. See Lenske v. United States, \_\_\_\_ F.2d \_\_\_\_ (9th Cir., Nos. 19,539 and 20,448, August 28, 1967).

CONCLUSION

Amicus curiae believes that the Court should grant the petitions for rehearing en banc to consider the important constitutional questions raised above.

Respectfully submitted,



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October 23, 1967

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CERTIFICATE OF SERVICE

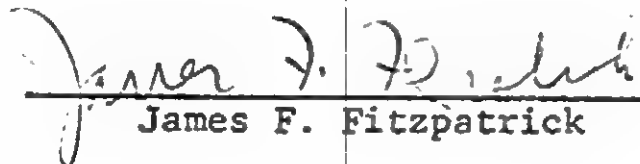
This is to certify that I have served the foregoing Motion for Leave to File Memorandum Amicus Curiae in Support of Petitions for Rehearing En Banc and Memorandum of Amicus Curiae in Support of Petitions for Rehearing En Banc upon counsel for appellants and appellee:

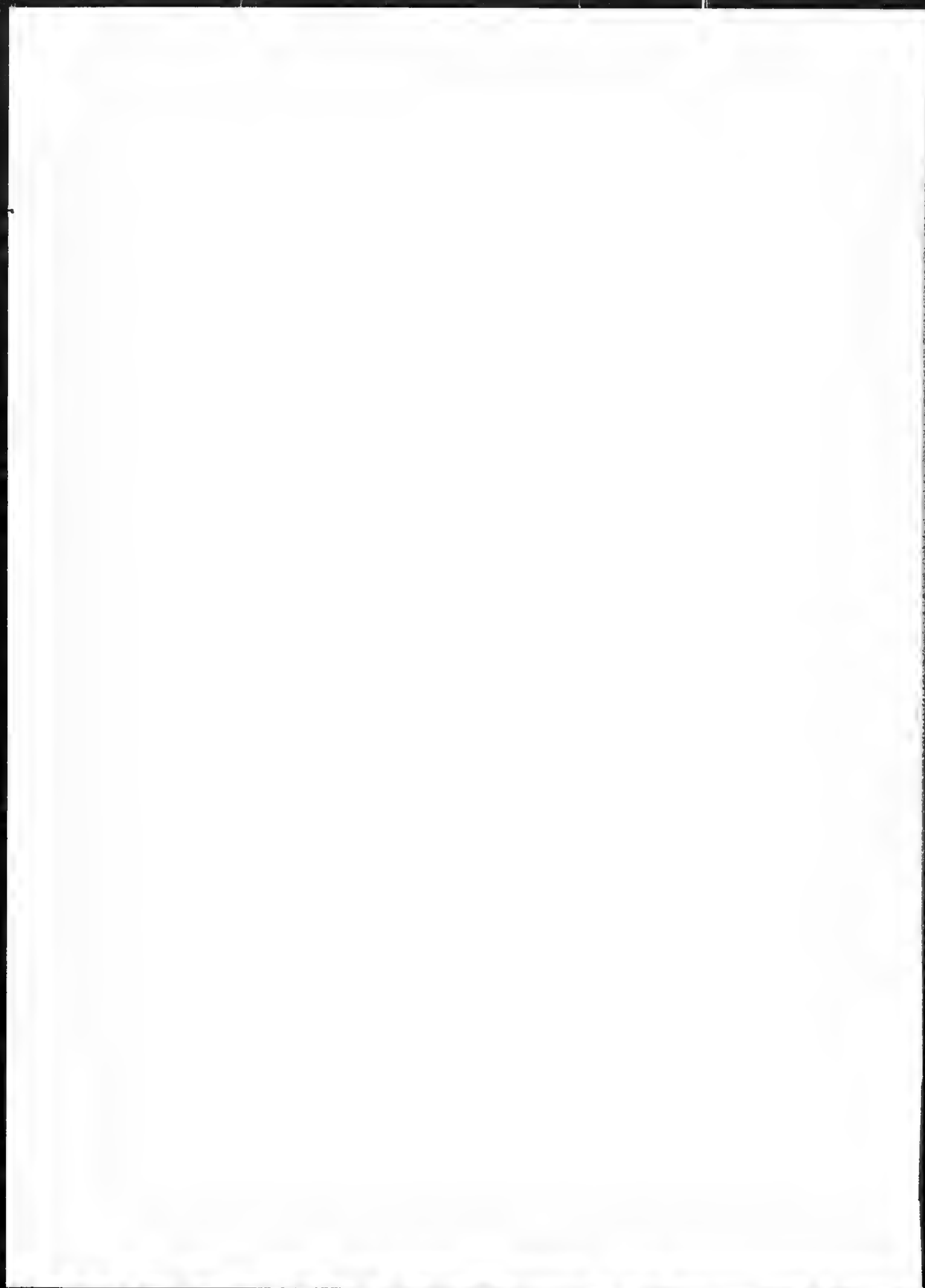
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by mailing copies, first class mail, postage prepaid.

  
James F. Fitzpatrick



UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
for the District of Columbia Circuit

JAMES J. LAUGHLIN  
ALLAN U. FORTE

FILED OCT 23 1967

Appellants

*Nathan J. Paulson*  
CLERK

v.

Nos. 19562 and 19563

UNITED STATES OF AMERICA

Appellee

PETITION FOR REHEARING EN BANC

Now comes the appellants and petition for rehearing in the above entitled causes. The following are the grounds:

1 - It is contended on behalf of the appellant Forte that the opinion of the court dated July 28, 1967, is not in harmony with other decisions of this court regarding the use of prior criminal convictions during the crossexamination of a defendant on the stand. Specifically wherein Forte was crossexamined, the government was permitted, over objection following an extended hearing, to ask Forte whether or not in March of 1942, he had been convicted of the crime of abortion in North Carolina. We must bear in mind that this question was asked during the trial which took place in June of 1953 - over 23 years from the date of the alleged conviction. The conviction was for an offence related to the allegations at the trial in this case.

In the case of Luck v. United States 121 USAppDC 151, 348 Fed.(2) 763, the court was concerned with the use by the government in crossexamination of the defendant of a prior conviction. In Luck, the defendant was charged with housebreaking and grand

larceny and over objection, he was asked whether or not he had pleaded guilty to grand larceny sometime before. The court pointed out that Title 14 D. C. Code, Section 305, said that the conviction "may" as opposed to "shall" be admitted but that the trial court was not required to allow impeachment by prior conviction every time a defendant takes the stand, but leaves room for judicial discretion. The court pointed out that:

"the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction."

The court further said:

"In exercising the discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction."

This court has had occasion to clarify the scope and the vitality of the Luck opinion in the recent case of Gordon v. United States (#20,126, Decided September 18, 1967.). Since the Gordon case supra had occasion to go into this matter further in order to assist the trial court's discretion in the matter. In our view Gordon is now the law of the case. The court in Gordon pointed out:

". . . acts of deceit, fraud, cheating, stealing, for example are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or

direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not."

The court further pointed out that difficult problems may arise when the previous conviction is for the same or substantially identical conduct for which the defendant is on trial and went on to say:

"As a general rule, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity."

It would appear that the clarification of the Luck opinion and the guide lines laid down in Gordon that there was an abuse of discretion in permitting a twenty-three year old conviction for abortion to be used for impeachment purposes. It is contended that the crime of abortion offends primarily on moral and religious grounds than on grounds which indicate a depraved and untrustworthy man. We cannot overlook the present discussion as to the liberalization of abortion laws. We also desire to point out that in an effort to soften the effect of Forte's conviction counsel submitted the following instruction which was denied:

"You are further instructed that in evaluating such criminal record as affecting Forte's credibility you may also consider the explanation given by Forte on the witness stand attenuating such conviction including the testimony that Forte had received a pardon from the Governor of the State where the conviction was had."

2 - Failure to Instruct on Defendant's Theory of Defence.

Appellant Forte testified that he had known the witness Bernice Gross who was at one time a member of the Police Department in Baltimore. She was also acquainted with Samuel E. Wallace the arresting officer in Forte's case. He testified that Mrs. Gross had contacted him and offered to supply him with information as to Wallace's activities in Baltimore as well as in Washington. Since she had contact with the police force in Baltimore she told Forte that she had information as to Wallace's bribery attempts in Baltimore. He agreed to pay her for information in this respect. The following instruction was tendered on behalf of Forte:

"You are instructed that Forte has testified that his relationship with the witness Gross was instigated by Gross and the purpose of their meetings and telephone conversations was for Gross to supply Forte with information concerning one Samuel E. Wallace and that money was given by Forte to Gross for the purpose of covering Gross' expenses and to pay for the information concerning Wallace. If the jury believes the testimony of Forte or if the jury has any reasonable doubt concerning the matters about which Forte testified then the jury must return a verdict of not guilty as to Forte. In other words if the jury believe that Forte was not a party to any conspiracy and did not either directly or indirectly attempt to influence the witness Jean Smith as alleged in the indictment or if the jury has any reasonable doubt as to these matters then the jury must return a verdict of not guilty as to Forte."

The instruction was refused. Joint Appendix 117-118.

This Court in *Levine v. United States* 104 USAppDC 381; 261 Fed.(2) 747 held that it was reversible error to refuse to grant an instruction of this kind. In the *Levine* case

this Court cited with approval the following from Calderon v. United States 279 556:

"Where the evidence presents a theory of defence, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory".

This Court in Levine also quoted from Marson v. United States 203 Fed.(2) 904 CCA 6 as follows:

"(W)here a defendant in a criminal case presents a theory supported by the evidence, and the court's attention is particularly directed to it, it is reversible error to refuse to give a charge on such a theory."

This Court in Salley v. United States 122 USAppDC 359 again had occasion to speak on this subject. Judge Wright speaking for the Court said:

"Since Levine v. United States 104 USAppDC 281, 282; 261 Fed.(2) 747 (1958) it is clear that, despite the trial judge's correct charge that each element must be proved beyond a reasonable doubt 'it is reversible error for the court to refuse on request to instruct also as to defendant's theory of the case. This rule . . . applies as well to situations where special facts present an evidentiary theory which if believed defeats the factual theory of the prosecution'" See also Tatum v. United States 88 USAppDC 386, 391; 190 F92) 612,617.

In an earlier case - Tatum v. United States 88 USAppDC 386 Judge Bazelon made even a stronger pronouncement on this matter:

"in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence even though the evidence may be weak, insufficient, inconsistent or doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own."

Practically all circuits follow this procedure. See  
the following:

|                             |            |     |       |
|-----------------------------|------------|-----|-------|
| Pine v. United States       | 135 Fed(2) | 353 | CCA5  |
| U.S. v. Blane               | 375 Fed(2) | 249 | CCA6  |
| Steiger v. United States    | 373 Fed(2) | 133 | CCA10 |
| United States v. Noble      | 155 Fed(2) | 315 | CCA3  |
| United States v. Schanerman | 150 Fed(2) | 941 | CCA3  |

### 3 - Violation of Criminal Statutes.

We regard this point very important. It is well to set forth at this point the directives now in existence by the Department of Justice and the Federal Bureau of Investigation:

#### DEPARTMENT OF JUSTICE DIRECTIVE:

"This Department must never proceed with any investigation or case which includes evidence illegally obtained or the fruits of that evidence. No investigation or case of that character shall go forward until such evidence and all of its fruits have been purged and we are in a position to assure ourselves and the court that there is no taint of unfairness."

#### FEDERAL BUREAU OF INVESTIGATION:

"Entrapment or the use of any other improper, illegal or unethical tactics in procuring information in connection with investigative activity will not be tolerated by the Bureau."

When the government becomes a lawbreaker it without doubt dilutes the due administration of justice. We believe Justice Douglas speaking for the Supreme Court in *Rea v. United States* 214 sounded the warning:

"The obligation of the federal agent is to obey the rules. They are drawn for the innocent and guilty alike. They prescribe standards for law enforcement. . . . That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings".

We now set forth the violations of the law in this case.

There had been testimony in the case that the witness Gross had received money from appellant Forte. According to her testimony this money was to go to Jean Smith - the victim of the alleged abortion. Dr. Forte had testified that he supplied money to Mrs. Gross to investigate Samuel E. Wallace a police officer who was the arresting officer in Dr. Forte's case.

Wallace had been suspected of bribery and in fact Mrs. Gross had related to Mrs. Smith that Wallace had been "paid off." In any event, Mrs. Gross was in a quandary as to whether she should report these sums of money. She then sought the advice of the Assistant United States Attorney as to the procedure to be followed in the case of Mrs. Smith as well as Mrs. Gross.

"Mr. Sullivan. I don't know how she considered it or how she would consider it on reflection. She might not consider it a gift or maybe wouldn't consider it an income. . . way you get money like that, don't talk about it, as a rule, but just a question to be aware of what might possibly come.

"Mrs. Gross. Why, if Forte deducted it.

"Mr. Sullivan. That is true too. He didn't. No I checked." (Joint Appendix 565-566)

This was a clear violation of the Internal Revenue Code.

This reads as follows:

Section 7213 of the Internal Revenue Code provides:

"It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income. . . or any particular thereof. . . and it shall be unlawful to print or publish in any manner whatever . . . any return or any part thereof . . . and any person committing an offense against the foregoing provision shall be guilty of misdemeanor and upon conviction thereof, shall be fined not more than \$1,000.00 or imprisoned not more than 1 year or both. . . if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

We believe it is well understood that the revealing information from an income tax return is serious indeed. In our view not even a member of Congress can obtain such information. Only the President of the United States, upon proper and

legitimate request can make this available. Joint Appendix 565, 566 reflects this violation of the law.

As to government officials flouting the law it is well to consider some of the cases.

Judge Learned Hand in United States v. Pugliese 153 Federal (2) 497 speaking for the court said:

"As we understand it the reason for the exclusion of evidence competent as such which has been unlawfully acquired is that exclusion is the only practical way of enforcing the constitutional privilege".

The Assistant United States Attorney also violated a criminal statute in Maryland. He went to Baltimore and over the objection of Mrs. Gross he set up a recording in her bedroom. Of course Mrs. Gross, having committed many acts of perjury in the District of Columbia was in fear of prosecution and she felt that she had to do the bidding of the Assistant United States Attorney. This is the Maryland statute applicable: Section 93, Article 35, Annotated Code of Maryland (1957) provides:

No person shall:

- "1 - Obtain or attempt to obtain the whole or any part of a telephonic communication to which such person is not a participant by means of any device, contrivance, machine or apparatus, whether electrical, manual, or otherwise, unless consent is given by the participants;
- "2 - Tamper with the wires, connections, boxes, fuse, circuits, lines or other equipment of facilities of a telephonic or telegraphic company over which messages are transmitted with the intent to obtain unlawfully the contents of a telephonic or telegraphic communication to which such person is not a participant."

The penalty for violation is set forth in Section 99, Article 35:

"Any person violating any of the provisions of this title shall be deemed guilty of a misdemeanor and shall upon conviction thereof be subject to a fine of not more than \$1000.00 or to imprisonment for not more than 90 days or to both such fine and imprisonment." (1956, Chapter 116, Section 1).

The recordings between Mrs. Gross and Officer Wallace will be found in the Joint Appendix at pages 494 - 506. We desire to point out that the office of the United States Attorney had the benefit of these recordings in the preparation of the cases but we were denied the use of them for the purposes of cross examination.

To show that Mrs. Gross was an unwilling participant to the matter of the recordings is reflected in the transcript 1734 to 1750 (Criminal Case 406-65):

"Mrs. Gross. But after all who am I to tell Mr. Sullivan what to do.

I said I didn't want Mr. Sullivan to use it but he is the Assistant United States Attorney here in Washington and whatever Mr. Sullivan wanted to do, why I assumed it was correct.

No if he wanted to use it then he was able to use it. I couldn't stop him.

I said to Sullivan 'I wouldn't want you to use this recording in any way'.

The Assistant United States Attorney also revealed grand jury testimony to Mrs. Gross to assist her in her future testimony. Joint Appendix 512 reflects the following:

"Mr. Sullivan. (To Mrs. Gross.) I expect that there's at least a possibility that Laughlin might call you tonight.

\* \* \*

"Mr. Sullivan. He may possibly call you because he's before the grand jury today.

"Mrs. Gross. He was.

"Mr. Sullivan. And he doesn't know any Bernice Gross."

And to thoroughly brief Mrs. Gross as to the proceedings before the Grand Jury we find:

"Mr. Sullivan. . . . so I assumed he was trying to camouflage to the grand jury. . . . I did say this to him so he would think that I was trying to bluff him. I said 'if I told you Jean Smith that (sic) that Bernice Gross and Bernice Gross and you met this week in the National Press Building, what would you say about that?' and he said 'Oh, that is a terrible lie.' So he assumed then that I was bluffing."

And Mr. Sullivan continued to reveal Grand Jury testimony to Mrs. Gross:

"Mr. Sullivan. . . . I also bore down on Lorraine and I said you know that Bernice said that Lorraine knew Bernice Gross and so on and so on . . ."

Of course this is a violation of the Rules of Criminal Procedure. As to violations of law by government officers the following are helpful:

Olmstead v. United States 277 United States 438  
Justice Brandeis dissenting:

"When these unlawful acts were committed they were crimes only of the officers individually. The government was innocent in legal contemplation; for no federal official is authorized to commit a crime in its behalf. When the government having full knowledge sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes (citing cases) and if this court should permit the government, by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem to be present all of the elements of a ratification. If so, the government itself would become a lawbreaker."

Casey v. United States 276 U.S. 413:

"For no officer of the government has power to authorize the violation of an act of Congress and no conduct of the officer can excuse the violation."

In United States v. Cutshall, 218 Fed. Supplement 767, we find:

"The government is prohibited from violating the Fourth Amendment through its agents and using the fruits of such unlawful conduct, directly or indirectly or through leads from the unlawful encroachment. . . ."

In Williamson v. United States, 311 Fed.(2) 441 CCA 5 (1962)

the Court said:

"Under the principles settled in McNabb v. U.S., 318 US, 332, and its progeny. . . it becomes the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes."

While most of the unlawful conduct on the part of government agents arises from unlawful searches the principles are the same. A well considered opinion by the Supreme Court of Iowa in State v. Hagen, 137 NW(2) 895 (1965) is helpful:

"A search is good or bad when it starts and does not change character from its success (United States v. Di Re, 332 US 581) The right of officers to thrust themselves is a grave concern not only to the individual but to a society which chooses to dwell in a reasonable security and freedom from surveillance. . . . An unlawful search taints all evidence obtained at the search or through leads uncovered by the search. The fruit of the poisonous tree doctrine is to the effect that unlawful search taints not only evidence obtained by the search but facts uncovered by process initiated by the unlawful act (United States v. Avila 227 Fed. Supl. 3"

It must not be overlooked that the same Assistant United States Attorney arranged a series of recordings between appellant Laughlin and the witness Gross and these recordings were held by

this Court to violate the Federal Communications Act (120 USApp DC 93). Notwithstanding, the same recordings were played before the grand jury (Joint Appendix 521 and 529.) There is also before this Court the grand jury testimony of Joyce Johnson. This is the same grand jury which returned the indictment against the appellants. At page 60 of her testimony this occurred:

"Mr. Sullivan. While we are waiting for the witness, Mrs. Johnson, I will play this tape of a telephone conversation.

The transcript reflects:

a tape  
(At this point in the proceedings/of a telephone conversation between Bernice Gross and James J. Laughlin was played before the grand jury).

and the transcript further reflects:

"Mr. Sullivan. Now ladies and gentlemen of the jury you have just heard the tape which Mrs. Gross has told me outside of the grand jury that she made today with Laughlin. James J. Laughlin the attorney. Now I know the setup for this tape recording was here in the United States Courthouse on this EKO Tape Machine. and that it was made in the presence of members of the police force of Washington here with Mrs. Gross's consent when she called Laughlin's number here in Washington."

(It is interesting to inquire as to the purpose of deception. Mr. Sullivan well knew that he himself arranged the recordings and the consent of Mrs. Gross was not a voluntary one.)

In that same proceeding after the tapes were played

Mr. Sullivan said to the grand jury:

"So if he (Laughlin) did have something to hide, and if he did think we were bluffing about how much we knew about the truth, perhaps that's the reason he came forward and made the other statement he did."

Of course this was done to inflame the grand jury against appellants.

Orfield on "Criminal Procedure under Federal Rules" says as to Section 6:74:

"It is the duty of the attorney presenting a case to the grand jury not to improperly influence the jurors, participate in its deliberations, express opinions on questions of fact or commit other acts of misconduct".

In United States v. Wells, 163 Federal 313 the court said:

"The District Attorney should not give advice or express his opinion as to the sufficiency of the evidence".

There is no doubt that the Assistant United States Attorney tried in various ways to inflame the grand jury against the appellants. Not only were the unlawful tapes played before the grand jury but no stone was left unturned to place the appellants in an unfavorable light. By referring to joint appendix 619 to 623 we can see that there was a concerted effort to discredit appellant Laughlin. The Assistant United States Attorney told the grand jury that appellant Laughlin had stated to him that the complaining witness had a reputation for immorality. That was false but that is not too important. Although the police officer was supposed to be under investigation he brought him before the grand jury to "contradict" appellant. He succeeded in inflaming the grand jury. One juror remarked:

"Mr. Laughlin seems to be throwing around an awful lot of accusations".

Another juror said:

"This man Laughlin has made a charge."

Another juror said:

". . . I think this grand jury wants to hold this testimony on a little higher standard than Jim Laughlin's concept of trying a law case".

With poison being fed to the grand jury it is difficult to see how the inquiry could be an impartial one. It is obvious that the grand jurors did not know appellant Laughlin and had no knowledge how he tried a case in court. As an instance of the attempt to influence the grand jury at page 153 of the testimony of Mrs. Gross before the grand jury on March 18, 1963, this occurred:

"Deputy Foreman. Now we have evidence here that Forte, and I am not going to call him a doctor, he's not a doctor. . ."

This juror did not know Dr. Forte. As a matter of fact Forte is a doctor of therapy.

Therefore considering the fact that the unlawful tapes were played before the grand jury and the studied efforts on the part of the Assistant United States Attorney to inflame the grand jury we believe that this case comes within United States v. DiGrazia 213 Fed. Supl. 232 where the indictment was quashed. The court said:

"It is the duty of the prosecutor presenting a case to a grand jury not to inflame or otherwise improperly influence the jurors against any person. . ."

See also United States v. Farrington 5 Federal 343.

In United States v. Laughlin 226 Fed. Supl. 112 Judge Curran said:

"It is also true that an indictment will not be dismissed if there is some incompetent evidence before the grand jury, as long as there is sufficient competent evidence to sustain it. However there may be competent evidence and illicit evidence before the grand jury and the two may be so intertwined that the Court is unable to say (even if it considered the competent evidence sufficient) that the grand jury did not in fact return the indictment primarily influenced by the illicit evidence. That, the Court considers to be the case here".

Inasmuch as Judge Curran in his opinion held in effect that the grand jury was influenced by the illicit evidence it is our view that Freeman on Judgments has application:

"In order that a judgment may operate as res judicata and be conclusive evidence of a fact sought to be established by it not only must that fact have been in issue and determined in the former suit, but it must have been a material fact in the case, one upon which the judgment in some way depended".

We have endeavored to keep this petition for rehearing within reasonable limits. We do however endeavor to allude to the following:

1 - There was read to the jury a count in the indictment that has been dismissed. This constituted another offense for which the appellants were not on trial. The error was the error of the court - not counsel. The record was properly preserved. See Joint Appendix 115-116.

2 - Receipt in evidence of telephone records.

It is our contention that the telephone records were not properly in evidence. It is our view that Judge Curran's opinion in 226 Fed. Supl. 1 was to the effect that such records were not admissible in evidence. Otherwise he would have held that the records supplied the necessary corroboration. Therefore the government was collaterally estopped from using them in this case.

3 - Coercion of Mrs. Gross.

It is our view that the testimony of Mrs. Gross should have been excluded. She first testified before the grand jury and

said she did not know the appellants. She was then taken to the office of the United States Attorney and interrogated for some three hours without benefit of counsel. She was reminded that she was in danger of prosecution and that she should get on the "right team". She was then taken again before the grand jury and then forced to participate in unlawful recordings. She was then taken under the wing of the prosecutor's office. Some 20 or 25 visits were made to her home. In addition there were perhaps 200 telephone calls passing between Gross and the Assistant United States Attorney. She had the right to telephone the Assistant United States Attorney collect either at his home or at the courthouse at anytime of the day or night. Of course the purpose was obvious. He wanted to keep her on the "right team", and he wanted to make certain that she would not change her story. We think the reasoning of Judge Frank in *Leyra v. Denno* 208 Fed.(2) 605 are pertinent:

"I think the state introduced no evidence whatever to support a finding that the effect of the promises - as distinguished from the effect of the coercion had worn off when the defendant made the later confession. . . . in short there was a complete failure to overcome the inference of a persisting influence of the promises . . . ."

The Second Circuit had ruled otherwise. Judge Frank dissented. The Supreme Court granted certiorari and reversed. Justice Black speaking for the court virtually adopted the dissent of Judge Frank when he said:

". . .we hold that use of confessions extracted in such manner from a lone defendant unprotected by

counsel is not consistent with due process of law as required by the Constitution. 347 United States 556.

It must be remembered that Mrs. Gross had admitted to many acts of perjury and of course she was desirous of staying on the "right team".

As to the right of a defendant to object to the confession of a witness it would seem that Turner v. Pennsylvania 338 US 62 is nearest in point. We believe that it presents a constitutional question. Clearly if the United States Attorney attempted to prosecute Mrs. Gross for perjury her answers made before the grand jury would be excluded as obtained under duress and untrustworthy. It would seem to follow therefore that if her testimony would be ruled out in her own case as untrustworthy then the same rule should apply if she attempted to testify against a defendant.

We ask therefore that the petition for rehearing en banc be granted.

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James J. Laughlin  
Appellant in proper person.  
National Press Building

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William J. Garber  
412 - 5th Street, N.W.  
Counsel for appellant Forte

We certify that this petition for rehearing en banc is filed in good faith and not for delay.

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James J. Laughlin

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William J. Garber

I certify that I have this 11th day of October, 1967, mailed copy of this petition for rehearing en banc to David G. Bress, United States, Attorney, Washington, D. C.

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James J. Laughlin